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In The

Supreme Court of the United States

October Term, 1983

MARJORIE SCHLOSSBERG DORIN and PHILIP DORIN,
Plaintiffs-Appellants,

vs.

CLUB MEDITERRANEE, S.A., a Foreign Corporation,
Defendant-Appellant,

-and-

CLUB MED, INC., CELEBRITY TRAVEL SERVICE, LTD., KENT TRAVEL SERVICE, INC., SOCIETE GENERALE and NATIONAL UNION FIRE INSURANCE COMPANY,
Defendants.

On Appeal from the New York Supreme Court, Appellate Division, First Department

JURISDICTIONAL STATEMENT AND APPENDIX FOR DEFENDANT-APPELLANT

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QUESTION PRESENTED BY THE APPEAL

Have the New York courts violated the Supremacy Clause of the Constitution, international comity, and the provisions of the Convention of the Taking of Evidence Abroad in Civil or Commercial Matters by ordering responses to interrogatories to be compelled of a French corporation in the Republic of France pursuant to the New York Civil Procedure Law and Rules?

A LIST OF THE PARTIES TO PROCEEDING IN THE NEW YORK COURTS

Co-defendant parties listed in the above caption include: Club Med, Inc., a Delaware corporation; Celebrity Travel Service, Ltd., a New York corporation; Kent Travel Service, Inc., a New York corporation; Societe Generale, a French corporation; and National Union Fire Insurance Company, a Pennsylvania corporation.

RULE 28, RULES OF THE SUPREME COURT

Notice is hereby given that 28 U.S.C. §2403(b) may be applicable. To the best of Appellant's knowledge no court has certified to the Attorney General of the State of New York the fact that the constitutionality of the New York Civil Practice Law and Rules, as applied, has been drawn in question.

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No.

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October Term, 1983

MARJORIE SCHLOSSBERG DORIN and PHILIP DORIN,

Plaintiffs-Appellees,

vs.

CLUB MEDITERRANEE, S.A., a Foreign Corporation,

Defendant-Appellant,

-and-

CLUB MED, INC., CELEBRITY TRAVEL SERVICE, LTD., KENT TRAVEL SERVICE, INC., SOCIETE GENERALE and NATIONAL UNION FIRE INSURANCE COMPANY,

Defendants.

On Appeal from the New York Supreme Court, Appellate Division, First Department

JURISDICTIONAL STATEMENT AND APPENDIX FOR DEFENDANT-APPELLANT

OPINIONS AND ORDERS BELOW

No opinion was rendered by the Appellate Division, First Department of the Supreme Court of the State of New York with respect to either of the two appeals presented to it by Appellant Club Mediterranee, S.A., in connection with this litigation. Rather, the Appellate Division, First Department, affirmed the order of the Supreme Court of the State of New York, New York County (Parness, J.) by order entered April 26, 1983 (Appendix p. 1a). Similarly, the Appellate Division, First Department, denied Appellant Club Mediterranee, S.A. leave to appeal to the New York Court of Appeals from its April 26, 1983 order, by its second order entered June 28, 1983 (Appendix p. 3a).

The opinion and order of the Supreme Court of the State of New York, New York County (Parness, J.) appears in the appendix at page 5a.

This Court has previously had this matter before it in the form of a motion for stay, which was addressed by a single justice. Chief Justice Warren E. Burger, in response to such motion, entered an order on July 21, 1983, staying the orders of the New York state courts which would have compelled responses to the interrogatories in question (Appendix p. 17a). Chief Justice Burger's stay order remains in effect pending the final disposition of this appeal before this Court.

THE COURT'S JURISDICTIONAL GROUNDS

This is an appeal from a final order of the Appellate Division, First Department, of the Supreme Court of the State of New York, dated June 28, 1983, denying permission for leave to appeal to the New York Court of Appeals (the highest appellate court in the State of New York), from the order of the Appellate Division, First Department (dated April 26, 1983) which affirmed the

January 5, 1983 order of the Supreme Court of the State of New York, New York County (Parness, J.) compelling responses to certain interrogatories served on Appellant in violation of the provisions of a treaty existing between the United States and the Republic of France and, thus, in contravention of the Supremacy Clause of the Constitution of the United States as well as French Sovereignty and internal French law. The treaty in question is The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 28 U.S.C. Section 1781.

The order of the Appellate Division, First Department sought to be reviewed is dated April 26, 1983.

The statutory provisions believed to confer jurisdiction of the appeal as to this Court are 28 U.S.C. §1257(1), 28 U.S.C. §1257(2) and 28 U.S.C. §1257(3). A number of cases support exercise of this Court's jurisdiction.

This matter properly comes within this Court's appellate jurisdiction as this Court has "held consistently that a state statute is sustained within the meaning of §1257(2) when a state court holds it applicable to a particular set of facts as against the contention that such application is invalid on federal grounds," *Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 441 (1979); *see, e.g., Cohen v. California,* 403 U.S. 15, 17-18 (1971), and state court rules have been explicitly held by this Court to be "statutes" within the meaning of §1257(2), *In re Griffiths,* 413 U.S. 717 (1973); *Mayer v. City of Chicago,* 404 U.S. 189 (1971); *Lathrop v. Donohue,* 367 U.S. 820, 824-25 (1961). Moreover, there are specific instances of this Court exercising appellate jurisdiction over state court refusals to recognize treaties or where state courts had sustained their own laws when challenged as contravening treaties, *see, e.g., Burthe v. Davis,* 133 U.S. 514 (1890); *Worcester v. Georgia,* 6 Pet. 515 (1823).

The cases establishing the supremacy of treaties (and international laws) in relation to state laws are legion, *see, e.g., Takahashi v. Fish & Game Com'n.*, 344 U.S. 410 (1948); *Missouri v. Holland*, 252 U.S. 416 (1926); *The Paquete Habana*, 175 U.S. 677 (1900); *Hauenstein v. Lynham*, 100 U.S. 483, 488-90 (1880); *Gibbons v. Ogden*, 9 Wheat. 1 (1824); *Ware v. Hylton*, 3 Dall. 199 (1796), as are those indicating that dealings with foreign states (and particularly dealings which challenge foreign sovereignty) are matters exclusively within the province of the federal government, into which the states should not interject themselves. *Zschernig v. Miller*, 389 U.S. 429 (1978); *Banco Nacional de Cuba Sabbatino*, 376 U.S. 398 (1964); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936). Finally, the cases also establish that, for purposes of the finality requirements of 28 U.S.C. §1257, the June 28, 1983 ruling of the Appellate Division, First Department is certainly a final judgment or decree, despite the fact that there will be further proceedings in the lower state courts. *Nebraska Press Ass'n v. Stuart*, 423 U.S. 1327, 1329 (1975) (Blackmun, J.); *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1974); *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555 (1963); *Cohen v. Beneficial Indust. Loan Corp.*, 337 U.S. 541 (1949); *Forgay v. Conrad*, 6 How. 201 (1848).

CONSTITUTIONAL PROVISION, TREATY AND RULES INVOLVED

A. United States Constitution, Art. VI, cl. 2:

> This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

B. Treaty:

> Convention On the Taking of Evidence Abroad in Civil or Commercial Matters, 28 U.S.C. §1781 (Appendix pp. 19a-79a).

C. New York Civil Procedure Law and Rules:

> Sections 3130 and 3131 and Rules 3132-3134 inclusive (Appendix pp. 80a-87a).

STATEMENT OF THE CASE

Appellees filed this action, on or about February 23, 1982 in the New York Supreme Court, New York County (one of several trial courts of general jurisdiction in the State of New York) against Club Mediterranee, S.A. and others[1] for personal injuries allegedly

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1. Co-defendant parties include: Club Med, Inc., Celebrity Travel Service, Ltd., Kent Travel Service, Inc., Societe Generale and National Union Fire Insurance Company. None of these co-defendant parties, to the best of the

(Cont'd)

sustained by Marjorie Schlossberg Dorin while she was a guest at a Club Mediterranee, S.A. resort in the Republic of Haiti during the period between December 26, 1981 and January 2, 1982. Issue was joined on or about March 26, 1982.

Club Mediterranee, S.A. is a French corporation, duly existing pursuant and subject to the laws of France, including, but not limited to, those international treaties and conventions to which France is a signatory. Said Appellant is not incorporated anywhere within the United States nor does it maintain any offices in this country for the purpose of its ownership, operation and/or control of the resort in question. A subsidiary, Club Med, Inc., organized in Delaware and maintaining an office in New York City, serves as its sales agent in the United States.

On or about September 14, 1982, appellees' counsel served the set of interrogatories in question[2] directly upon the undersigned firm as counsel for Club Mediterranee, S.A. in clear contravention of the terms and requirements of the Convention on the Taking

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(Cont'd)
appellant's knowledge, has an interest in the subject matter of this appeal. However, service of copies of the notice of appeal and this jurisdictional statement and appendix has been made upon these co-defendant parties as well as upon appellees.

2. It should be noted that almost every interrogatory contains a request for the identification or description of allegedly relevant documents (Appendix pp. 97a-101a). Accordingly, appellee's discovery request will necessitate an internal document search and production by appellant *in France* in addition to the provision of written answers to the interrogatories themselves. Thus, the response to appellees' discovery request will be more complex than that which a routine response to interrogatories would normally entail. It should be further noted that for the purpose of clarity and abbreviation, the term "interrogatories" shall be used hereinafter to refer to *both* the interrogatories themselves as well as the document identification requests contained within such interrogatories.

of Evidence Abroad in Civil or Commercial Matters, 28 U.S.C. Section 1781; [1972] 23 U.S.T. 2555; T.I.A.S. No. 7444 (hereinafter referred to as the "Hague Evidence Convention"). The United States and France are parties to the Hague Evidence Convention. This international treaty, as its name implies, was adopted specifically for the purpose of regulating and administering the process of taking evidence in civil cases such as the one at bar.

On November 30, 1982, Appellant moved in Special Term, Part 8A of the Supreme Court of the State of New York, County of New York, pursuant to Rule 3133 of the New York Civil Procedure Law and Rules ("CPLR"), for an order striking appellees' interrogatories on the ground that, *inter alia,* such interrogatories violated both the Hague Evidence Convention and the Supremacy Clause of the Constitution of the United States. Appellant also alleged that the interrogatories contravened the civil and criminal law of the French Republic, thus violating international law and principles of international comity.

At all times, Club Mediterranee, S.A. has adhered to the position that it did not seek to avoid compliance with whatever proper discovery requests may be contained within the propounded interrogatories, but rather it sought only that the provisions of the Hague Evidence Convention and of French law be observed.

On January 5, 1983, the Court, per Honorable Stanley Parness, Justice, granted Appellant's motion to the extent that interrogatories numbers 8, 9, 12 and 13(d) were stricken on other legal grounds, but held that the Appellant's "contention that service of the interrogatories is barred by the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of March 13, 1970, is without merit . . . [because] the Hague Convention proscribes the taking of evidence by the two methods set forth therein only in *French Territory* (emphasis by Court) . . ." (Appendix p. 6a).

On or about February 1, 1983, Appellant filed its notice of appeal of Justice Parness' order with the Appellate Division, First Department of the New York Supreme Court. Thereafter, on or about April 26, 1983, the Appellate Division affirmed Justice Parness' order without opinion (Appendix p. 1a).

Appellant then moved the Appellate Division, on June 9, 1983, for an order pursuant to CPLR Section 5602(b)(1), granting leave to Appellant Club Mediterranee, S.A. to appeal to the Court of Appeals (the highest appellate court of the State of New York) from the order of the Appellate Division, on the grounds that the aforesaid order: (1) was erroneous as a matter of law and (2) directly contravened superseding federal and international law. In addition, Club Mediterranee, S.A. sought the certification of the following questions of law as decisive in the determination by the Appellate Division and as presenting issues which merit review by the Court of Appeals:

1. Are the provisions of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (hereinafter, Hague Evidence Convention), 28 U.S.C. Section 1781, applicable to pre-trial discovery proceedings in a New York State Supreme Court action involving a French corporation as a party defendant?

2. Do the provisions of the Hague Evidence Convention, which as been formally adopted and enacted by the governments of the United States and France, supersede conflicting New York State procedural law in the administration of a civil case in this State?

3. Are the courts of the State barred, pursuant to the mandates of international law and comity, from compelling a French domiliary to violate the penal laws of France by disclosing information through pre-trial discovery procedures which contravene the requirements of the Hague Evidence Convention? (Appendix pp. 103a-104a).

In the alternative, a request was made for "a stay pending a disposition of the issues herein by the United States Supreme Court in the case of *Volkswagenwerk, A.G. v. Falzone,*" *appeal docketed* No. 82-1888 (May 20, 1983). [*See* specifically pp. 9-10 of the affirmation of Robert Stein, Esq. in support of Appellant's motion for leave to appeal (Appendix p. 112a)]. Such motion was the only avenue of recourse open to Appellant, who could *not* as a matter of state law either appeal as of right to the New York Court of Appeals or move in the Court of Appeals itself for leave to be heard by that Court. *See* New York CPLR Sections 5601 and 5602(a) (Appendix pp. 83a-87a).

On June 28, 1983, the Appellate Division denied such leave to appeal without opinion (Appendix p. 3a). Accordingly, Appellant has exhausted all possible state court procedures and must take its appeal to the Supreme Court of the United States.

On July 1, 1983, counsel for appellees served Appellant a demand by letter which called for complete compliance with the interrogatories and document identification requests within a forty-eight hour period of time. While the efficacy of this demand is open to question,[3] Appellant was subjected to further motion practice by the plaintiffs-appellees. On July 13, 1983, appellees served a motion in the Supreme Court of the State of New York, County of New York, for an order striking the answer of Appellant

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3. CPLR Rule 3133(b) provides that "The answer to any interrogatory to which objection is made shall be deferred until the objections are ruled on by the court". Inasmuch as Justice Parness' original order provided that the answers to the interrogatories in question would be due twenty days after the service of his order upon appellant, and such order was not modified by the Appellate Division, First Department, it was the position of the appellant that it must answer the interrogatories within twenty days from the date that the Appellate Division denied leave to appeal to the Court of Appeals, to wit: July 18, 1983.

by reason of its failure to respond to those interrogatories not stricken by prior court order.

On July 15, 1983 Appellant made an application before the Honorable Thurgood Marshall, Associate Justice of the United States Supreme Court, for a stay of Justice Parness' order compelling responses to the interrogatories in question, pending this appeal. The matter was referred to Chief Justice Warren E. Burger and on July 21, 1983, Chief Justice Burger granted such stay (Appendix p. 17a).

Thus, at every stage, the question sought to be reviewed was timely raised.

There has been a final ruling of the Appellate Division, First Department of the Supreme Court of the State of New York that the provisions of the New York CPLR, as applied in this matter, take precedence over both a treaty between the United States and the Republic of France and the Supremacy Clause of the United States Constitution.

Specifically, the Judge Parness order, as sustained by the Appellate Division's refusal to reverse or permit Appellant to appeal, would require Appellant to conduct an internal document research and to provide certain information possessed by French nationals whom are employees of Appellant in France in response to interrogatories, pursuant to the New York CPLR rather than pursuant to letters rogatory as required by the Hague Convention.

Appellant contends that these procedures, are inconsistent with, and therefore violative of, the Hague Convention and the reservations included in the treaty by the Republic of France.

There are two methods of taking evidence under the Hague Convention: "Letters of Request" as set forth in Chapter I and "Taking of Evidence By Diplomatic Officers, Consular Agents

and Commissioners" in Chapter II. These modes of obtaining evidence are the only available means under the Convention for obtaining evidence of French nationals on French soil. Thus compliance with such modes is necessary in order to obtain any information. A review of the procedures for letters of request in Chapter I (Appendix pp. 19a-25a) clearly establishes that magistrates of the "Central Authority of the Contracting States" are the persons who perform the function of gathering the requested information — not American lawyers serving American-style interrogatories. (Appellees have been repeatedly advised of this procedure but have steadfastly refused to proceed in accordance with it.) Obviously, activities such as those order by the New York courts herein clearly violate French sovereignty and the French Criminal Code.

The opposition of the French Republic to the proposed interrogatories ordered by the New York State courts is made clear in a letter of the French Ministry of Justice, dated March 9, 1981, to James G. Hergen, Esq. of the Office of Foreign Litigation, United States Department of Justice, discussing Law No. 80-538 of July 16, 1980 which makes compliance with certain pre-trial discovery requests (such as the interrogatories at bar) a criminal offense under French Penal Law.[4] Such letter is reproduced here in full (*See also:* Appendix pp. 93a-96a):

> Ministry of Justice
> 13, Place Vendome

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4. Law No. 80-538 of July 16, 1980, as translated in Parker School Studies in Foreign and Comparative Law, Columbia University, *French Law: Constitution and Selective Legislation*, 8-49 to 50 (1981) is found at pages 88a-90a of the appendix. The original version, Appendice au Code de Commerce, Petis Codes Dalloz (Soizante-seizieme ed. 1980-81) is found at pages 91a-92a of the appendix.

The Director of Civil Affairs and The Sea

Paris, March 9, 1981

Mr. James G. Hergen
Attorney, Office of Foreign Litigation
Civil Division
Department of Justice
Washington, D.C., U.S.A.

Sir:

You have requested my department's opinion on the scope and significance of the law of July 16, 1980, amending the Law of July 25, 1968, concerning the disclosure of documents and information of an economic, commercial, industrial, financial, or technical nature to foreign natural or juristic persons. You have requested specific information regarding any effects this law may have on the implementation of The Hague Convention of 1970 on the taking of evidence abroad in civil or commercial matters, to which France and the United States are parties, as well as persons liable to incur the penalties stipulated by the law following violation of the provisions of its Article 1 bis.

I have the honor to inform you that Article 1 bis of the Law of July 15, 1980, amending the Law of July 2, 1968, is intended to ensure the enforcement in French territory of the regulations on the taking of evidence abroad as they are established in civil and commercial matters in France's relation with the United States by the

provision of The Hague Convention of March 18, 1970, together with the declarations and reservation made by the French government, taking the provisions of the French Code of Civil Procedure into consideration.

In accordance with the terms of these regulations, the only two methods of investigation in French territory that may be ordered by foreign legal authorities, subject to the conditions established by these instruments, are letters of request [*] and taking of evidence by diplomatic officers, consular agents, and commissioners (Chapters I and II of The Hague Convention of March 18, 1970, and Articles 755 et seq of the new French Code of Civil Procedure).

[*This term is used in the Hague Convention of March 18, 1970; the usual term is letters rogatory.]

Notwithstanding the agreement between the parties, Article 1 bis of the Law of July 1, 1980 prevents recourse in French territory to any other methods of investigation or procedure for taking of evidence that is considered unlawful, particularly recourse to requests for direct disclosure of documents or information.

Moreover, Article 1 bis makes it possible to punish violations of the conditions established in The Hague Convention and in the declaration which the French government made at the time of ratification of this instrument for the execution of letters of request and the taking of evidence by commissioners. Notwithstanding the agreement

between the parties, the law thereby makes it possible to prevent recourse to evidence taken by commissioners without prior authorization by my department.

It should be emphasized that the information communicated to you on the scope and significance of the law of July 15, 1980, concerns only the relations of judicial cooperation between our two countries in civil and commercial matters. My department had an opportunity to clarify these different points in its reply to a question in writing from Mr. Chinaud, a deputy, of which a copy is enclosed.

I also have the honor to inform you that the penalties stipulated by the Law apply irrespective of the status, nationality, or domicile of the person concerned.

Therefore the Law of July 15, 1980, has given full effect to our relation of judicial cooperation by assuring improved implementation of the provisions of The Hague Convention of March 18, 1970 and by enabling American litigants to obtain evidence in France, by methods that are in conformity with the international commitments of our two countries, for use in judicial proceedings in the United States.

If there is no objection, I would be grateful if you would inform the judicial authorities and legal practitioners of your country of this opinion.

Naturally, I would be willing to furnish any additional information. I am enclosing a copy of the legislative history of this law.

Very truly yours,

[Signature]
Renaud Deneix de Saint Marc

Throughout the various stages of these proceedings, the appellees have continued to obfuscate the primary issue. They appear to fault the clearly applicable treaty procedures as somehow being obstructive, unfair or even discretionary while they have not even attempted to comply with them, let alone to exhaust their remedies under the Hague Evidence Convention. They complain of allegedly delayed discovery but have refused, since the inception of the litigation, to expedite their needs in accordance with the sanctioned treaty methods. They urge the invalidity of applicable procedures which would request the cooperation of responsible French authorities although analogous procedures are well known in our own jurisprudence, *see, e.g.* letters rogatory under Rule 28(b) of the Federal Rules of Civil Procedure, a procedural device contemplating request for assistance from foreign authorities.

THE QUESTION IS SUBSTANTIAL

This case presents an unusual and significant question of first impression concerning the constitutionality of a state court discovery order that purports to compel French nationals to submit to New York discovery procedures in France; procedures that French law does not recognize and that are violative of treaty rights and of international comity. The issue of whether the order violates the procedures for judicial assistance set forth in the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, a treaty in force between the French Republic

and the United States of America, is both novel and substantial. For a state court judge to be permitted to ignore the mandates of an applicable treaty in violation of the Supremacy Clause of the United States Constitution and the judicial sovereignty of the French Republic would indeed be extraordinary.

The fundamental law that orders relations between these separate nations is customary international law, as well as treaties and other agreements to which they are parties, including the Charter of the United Nations.[5] On the international level, every intrusion by a court of one nation into what may be regarded as the sovereign domain of a foreign nation cannot avoid creating a political strain in the relations of the nations concerned.

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5. The basic treaty provisions requiring respect for the French Republic as a sovereign and equal and protection of the rights and interest of a French nationals and companies are set forth in the Charter of the United Nations, June 25, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153.

The first mandatory Principle of the Charter is the "sovereign equality" of all U.N. members (Art. 2, para. 1). The United Nations General Assembly has declared, without dissent, that the principle of sovereign equality of States includes *inter alia*, the following elements.

> "(a) States are juridically equal;
>
> (b) Each State enjoys the rights herein in full sovereignty;
>
> (c) Each State has the duty to respect the personality of other States;
>
> (d) The territorial integrity and political independence of the State are invoilable;. . ."

Declaration on Principles of Internal Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970).

It is, of course, open to any government to disagree with another and act firmly on its own convictions. But that is a political, not a judicial, decision. Absent a reasonably clear command by the competent political authorities, it is not the office of courts to be on the leading edge of international conflict involving the exercise of jurisdiction by one state in the territory of another.

The French Republic is a civil law state. Civil law states the position that, in general, the gathering of evidence within the state for civil litigation is an exercise of "judicial sovereignty" entrusted exclusively to the courts and that any encroachment of this function by the court or citizens of any foreign state may be regarded as a violation of France's "judicial sovereignty."[6]

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6. The Report of the United States Delegation (of leading experts in the field) to the Eleventh Session of the Hague Conference on Private International Law which prepared the Hague Evidence Convention on the initiative of the United States, contains the following observations in this regard [8 Int. L. Mat. ("U.S. Report") 785, 804, 806 (1969)]:

> "In drafting the Convention, the doctrine of 'judicial sovereignty' had to be constantly borne in mind. Unlike the common-law practice, which places upon the parties to the litigation the duty of privately securing and presenting the evidence at the trial, the civil law considers obtaining of evidence a matter primarily for the courts, with the parties in the subordinate position of assisting the judicial authorities.
>
> > The act of taking evidence in a common-law country from a willing witness, without compulsion and without a breach of the peace, in aid of a foreign proceeding, is a purely private matter in which the host country has no interest and in which its judicial authorities have normally no wish to participate. To the contrary, the same act in a civil law country may be a public matter, and may constitute the performance of a public

(Cont'd)

The difference between civil law and common law countries in this regard is well recognized. (*See* 4 Moore's Federal Practice, Sec. 28.05.)[7] The Hague Convention was the culmination of efforts

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(Cont'd)

> judicial act by an unauthorized foreign person. It may violate the 'judicial sovereignty' of the host country unless its authorities participate or give their consent. This civil law approach has a direct bearing upon choice among the three general methods of taking evidence abroad.
>
> First—the letter of request or 'commission rogatoire.' This is a truly 'judicial' act. The court of one State through appropriate channels, asks the court of another State to secure designated evidence for use at a trial in the requesting State. Here no 'sovereignty' problem exists because the evidence is taken through the judicial process of the requested State.
>
> Second—taking evidence by a diplomatic or consular requesting State. Diplomatic officers are infrequently employed for this purpose, but the use of consuls is well recognized within certain limits. Here there may be a 'sovereignty' question, as the State where the consult acts may object to his entering into 'judicial' activities on its territory in the absence of a consular convention authorizing him to do so.
>
> Third—the use of 'commissioners' nominated by the court of the State where the action is pending. Here the 'sovereignty' question is even more sharply raised. A commissioner acts as the extended arm of the court of the State which appoints him. In a State which follows the 'judicial sovereignty' concept, the activities of a foreign commissioner constitute an obvious intrusion by an agent of a foreign judicial 'sovereign'."

7. It is a crime in the Republic of France for a private person to perform a state function, such as the taking of evidence. *See* Letter of French Ministry of Justice, *supra*.

to set up a model system to bridge differences between the common law and civil law approaches to the taking of evidence abroad.

By ratifying the Hague Convention, the Republic of France has opened its doors to accommodate foreign litigants, but France, as it had a right to do under Article 35(d) of the treaty, specified certain limitations and qualifications to the Convention. Accordingly, the Republic of France has mandated that all discovery requests be channeled through a proper central judicial authority by means of a letter of request. This was not done in the instant case.

Although the important question at hand is an issue of first impression in this Court, the mandatory use by litigants of the Hague Convention's procedures for gathering evidence in foreign lands had been acknowledged by other courts. *See, e.g., Pain v. United Technologies Corp.*, 637 F. 2d 775 (D.C. Cir. 1980); *Federal Trade Commission v. Compagnie De Saint-Gobain-Pont-A-Mousson,* 636 F. 2d 1300, 1323 (D.C. Cir. 1980); *Volkswagenwerk Aktiengesellschaft v. Superior Court In And For Sacramento County,* 33 Cal. App. 3d 503, 109 Cal. Rptr. 219 (1973).

Aside from the fact that the execution of the order entered by the trial court in the instant case would result in a serious violation of French judicial sovereignty,[8] there is a compelling

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8. This case presents no element justifying an order ignoring the relevant French interests and policies. The rules regarding the taking of evidence in effect in France, while different from our own, are not unique; rather, they are characteristic of the European civil law system. Although there are inevitable differences on questions of when, how and in what form evidence may be taken, there is no suggestion that French rules are designed to frustrate the orderly collection of evidence in civil litigation, nor is there any evidence of hostility in French law or French courts to the underlying policies being advanced in negligence actions.

reason why the question raised by this appeal is manifestly substantial and calls for resolution in this Court.

The United States has entered into a treaty with the Republic of France providing a specific procedure to be used for the taking of evidence in France. Since the Hague Convention has been ratified by the United States and is a treaty, it constitutes the supreme law of the land. U.S. Const. Art. VI, cl. 2. As a treaty, the Hague Convention supersedes all inconsistent federal and state procedures and must be respected by the state courts under the Constitution of the United States.[9] A state court cannot add or take from the force and effect of such a treaty. *Hines v. Davidowitz,* 312 U.S. 52, 63 (1941), "Under the supremacy clause, it is indisputable that a valid treaty overrides any conflicting state law, even on matters otherwise within state control. Indeed, the treaty controls whether it is ratified before or after the enactment of the conflicting state law." (Citations omitted), Tribe, *American Constitutional Law* 168 (1978).

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9. U.S. Const. Art. VI. In its landmark decision in *Gibbons v. Ogden*, 9 Wheat. 1 (1824), this court stated,

> "The appropriate application of that part of the [supremacy] clause which confers the same supremacy on laws and treaties, is to such acts of the State Legislatures as do not transcend their powers, but, through enacted in the execution of acknowledged State powers, interefere with, or are contrary to the laws of Congress, made in pursuance of the constitution, or some treaty made under the authority of the United States. In each such case, the act of Congress, or the treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it."

See also, Missouri v. Holland, 252 U.S. 415 (1920); *Ware v. Hylton*, 3 Dall. 199 (1796); *Hauenstein v. Lynham*, 100 U.S. 483 (1800); *Takahashi v. Fish & Game Commission*, 334 U.S. 410 (1948).

While procedures governing the taking of discovery are generally matters within state control, when such procedure are inconsistent with Hague Convention, they are invalid. As this Court has declared in *United States v. Belmont,* 301 U.S. 324 at 331: "[I]f a treaty does not supersede existing state laws, as far as they contravene its operation, the treaty would be ineffective." A duly ratified treaty is unmodifiable for any reason, including "equity, general inconvenience or substantial justice." *United States v. Choctaw Nation,* 179 U.S. 494 (1900). Indeed the states are devoid of power to retard, impede, burden or in any way measure or control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government. *Nash v. Florida Industrial Commission,* 389 U.S. 235, 240 (1967). State law must yield when it is inconsistent with or impairs the policy or provisions of a treaty or of an international compact or agreement. *United States v. Pink,* 315 U.S. 203, 230-231 (1942). Accordingly, a litigant acting under authority of the courts of the State of New York, cannot constitutionally take actions inconsistent with, and contrary to, the Hague Convention.

The crux of the present controversy is that a New York state court judge, without correction by the New York appellate courts, has construed the court rules of the state as superseding a federal treaty. This in spite of the fact that the power to deal with sovereign states is something that reposes in the federal government exclusively; a power that antedates the American Constitution's adoption. *United States v. Curtiss-Wright Export Corp.,* 299 U.S. 304.

The failure of the state court in the instant case to apply a treaty of the United States, as well as its elevation of the New York Civil Practice Law and Rules over that treaty in contravention of the United States Constitution and of the fundamental principles of international law, international relations

and comity, gives rise to a highly significant constitutional issue bearing upon federal-state relations. The application and interpretation of a treaty, in this case the Hague Convention, presents a uniquely federal question which should be resolved by this Court. *The Paquete Habana,* 175 U.S. 677 (1900).

Throughout the history of this matter, the New York courts have been intransigent in their view that the provisions of the New York Civil Practice Law and Rules must prevail throughout the world. It would be availing to suggest that the apparently flagrant and deliberate flaunting of the Supremacy Clause of Article VI of the Constitution is not a substantial issue for this Court's consideration and decision. Further, the rights and duties of the contracting nations to a treaty to which the United States is a signatory cannot be overridden by the stubborn insistence of the New York courts that their rules and procedures universally prevail despite both the sovereignty and the criminal code of the country in which the New York compulsion is to be exercised.

It is respectfully submitted that the question here presented is so substantial as to require plenary consideration, with briefs on the merits and oral argument for their resolution. Appellant would also request, in the alternative, that should the Court not consider this appeal the appropriate mode of review, it consider and act upon these papers as a petition for certiorari.[10]

REQUEST FOR CONSOLIDATION OF REVIEW

Inasmuch as Appellant believes that the exact issue to be decided has already been placed on this Court's docket in the

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10. The Court can treat this matter pursuant to 28 U.S.C. §2103, as a petition for statutory certiorari under 28 U.S.C. §1257(3) or for common law certiorari or other appropriate writ under the All Writs Act, 28 U.S.C. §1651 pursuant to 28 U.S.C. §2103.

case of *Volkswagenwerk A.G. v. Falzone, appeal docketed* No. 82-1888 (May 20, 1983), it is respectfully suggested that, for the sake of judicial economy and good order, Appellant's appeal be coupled with, heard and considered at the same time as and in conjunction with that case.

CONCLUSION

It is respectfully submitted that with respect to this appeal, probable jurisdiction should be noted.

Dated: New York, New York
September 15, 1983

Respectfully submitted,

SOL KROLL

KROLL, POMERANTZ
& CAMERON
Attorneys for Defendant-Appellant
Counsel of Record

SOL KROLL
RAYMOND L. MYLOTT, JR.
Of Counsel

APPENDIX

ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK AFFIRMING THE ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY (PARNESS, J.), COMPELLING RESPONSES BY CLUB MEDITERRANEE, S.A. TO INTERROGATORIES, DATED APRIL 26, 1983

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 26, 1983

Present—Hon. Joseph P. Sullivan, Justice Presiding
David Ross
Arnold L. Fein
E. Leo Milonas
Bentley Kassal Justices

MARJORIE SCHLOSSBERG DORIN and PHILIP DORIN,
Plaintiffs-Respondents,

-against-

CLUB MEDITERRANEE, S.A.,
Defendant-Appellant

CLUB MED, INC., CELEBRITY TRAVEL SERVICE, LTD., KENT TRAVEL SERVICE, INC., SOCIETE GENERALE and NATIONAL UNION FIRE INSURANCE,
Defendants

16526N

Order Dated April 26, 1983

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Parness, J.), entered on January 5, 1983, which granted defendant-appellant's motion for a protective order striking plaintiffs' interrogatories only to the extent of striking interrogatories 8, 9, 12 and 13(d),

And said appeal having been argued by Robert Stein of counsel for appellant, and by Thomas A. Dickerson of counsel for respondents; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed. Respondents shall recover of appellant $50 costs and disbursements of this appeal.

ENTER:

JOSEPH J. LUCCHI
Clerk

ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK DENYING CLUB MEDITERRANEE S.A.'s APPLICATION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS OF THE STATE OF NEW YORK DATED JUNE 28, 1983

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on June 28, 1983.

Present—Hon. Joseph P. Sullivan Justice Presiding,
David Ross,
Arnold L. Fein,
E. Leo Milonas
Bentley Kassal, Justices

Marjorie Schlossberg Dorin and Philip Dorin,
Plaintiffs-Respondents

-against-

Club Mediterranee S.A.,
Defendant-Appellant

-and-

Club Med, Inc., Celebrity Travel Service, Ltd.,
Ken Travel Service, Inc., Societe Generale
and National Union Fire Insurance,
Defendants.

M-2757

The above-named defendant-appellant having moved for leave to appeal to the Court of Appeals from the order of this Court entered on April 26, 1983,

Order Dated June 28, 1983

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the papers filed in support of said motion, and the papers filed in opposition or in relation thereto; and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is denied with $20 costs.

ENTER:

JOSEPH J. LUCCHI
Clerk.

ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY (PARNESS J.), COMPELLING RESPONSES BY CLUB MEDITERRANEE TO INTERROGATORIES DATED JANUARY 5, 1983

SUPREME COURT OF THE STATE OF NEW YORK,
SPECIAL TERM, PART IA, NEW YORK COUNTY

at the Courthouse thereof, 60 Centre Street, New York, New York, 10007.

Present:

Hon. S. PARNESS, Justice.

MARJORIE SCHLOSSBERG DORIN ano.

-against-

CLUB MEDITERRANEE, S.A. et al.

The following papers numbered 1 to 4 read on this motion:

No. 66 on Calendar of Dec. 1982	PAPERS NUMBERED
Notice of Motion - Order to Show Cause and Affidavits Annexed	1 - 2
Answering Affidavit	3 - 4

Upon the foregoing papers this Motion by defendant Club Mediterranee, S.A. for a protective order striking plaintiffs' interrogatories dated September 14, 1982, is granted to the extent of striking interrogatories 8 (irrelevant), 9 (overbroad and improper combination of various questions), 12 (improper form and improper combination of various questions), and 13(d) (irrelevant).

Order Dated January 5, 1983

The movant's contention that service of the interrogatories is barred by the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of March 13, 1970, is without merit. Movant has not denied that it does business in this state or pleaded otherwise and even though movant was organized and exists under French Law, the Hague Convention proscribes the taking of evidence by the two methods set forth therein only in *French Territory* (emphasis by court), see exhibit D, movant's memorandum of law, translated letter from the Ministry of Justice of France dated March 9, 1981, to the United States Department of Justice.

The time for the movant to serve answers to the interrogatories, as modified, is extended twenty (20) days after service of this order upon the movant.

Dated Jan. 5, 1983 s/ SP J.S.C.

County Clerk's No. 4777, 1982
Liber D 174, Line 6, 1982

Entered 1-5-83

FINAL JUDGMENT OR DECREE OF THE APPELLATE DIVISION, FIRST DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK AFFIRMING THE ORDER OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY (PARNESS, J.), COMPELLING RESPONSES BY CLUB MEDITERRANEE, S.A. TO INTERROGATORIES

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 26, 1983

Present — Hon. Joseph P. Sullivan, Justice Presiding
David Ross
Arnold L. Fein
E. Leo Milonas
Bentley Kassal, Justices.

16526N

MARJORIE SCHLOSSBERG DORIN and PHILIP DORIN,

Plaintiffs-Respondents,

-against-

CLUB MEDITERRANEE, S.A.,

Defendant-Appellant,

-and-

Final Judgment or Decree

CLUB MED, INC., CELEBRITY TRAVEL SERVICE, LTD., KENT TRAVEL SERVICE, INC., SOCIETE GENERALE and NATIONAL UNION FIRE INSURANCE,

Defendants.

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Parness, J.), entered on January 5, 1983, which granted defendant-appellant's motion for a protective order striking plaintiffs' interrogatories only to the extent of striking interrogatories 8, 9, 12 and 13(d),

And said appeal having been argued by Robert Stein of counsel for appellant, and by Thomas A. Dickerson of counsel for respondents; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed. Respondents shall recover of appellant $50 costs and disbursements of this appeal.

ENTER:

JOSEPH J. LUCCHI
Clerk.

NOTICE OF APPEAL FILED WITH THE APPELLATE DIVISION, FIRST DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK DATED AND TIME-STAMPED JULY 21, 1983

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

Index No.: 4777/82

MARJORIE SCHLOSSBERG DORIN and PHILIP DORIN,

Plaintiffs/Appellees,

vs.

CLUB MEDITERRANEE, S.A., a Foreign Corporation,

Defendant/Appellant.

and

CLUB MED, INC., CELEBRITY TRAVEL SERVICE, LTD., KENT TRAVEL SERVICE, INC., SOCIETE GENERALE and NATIONAL UNION FIRE INSURANCE COMPANY,

Defendants.

NOTICE IS HEREBY GIVEN that CLUB MEDITERRANEE, S.A., the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Appellate Division, First Department of the Supreme Court of the State of New York, entered in this action on June 28, 1983, by which it denied leave to Appellant CLUB MEDITERRANEE, S.A. to appeal to the Court of Appeals of

Notice of Appeal Dated July 21, 1983

the State of New York; thus letting stand its Order, entered in this action on April 26, 1983, affirming the Order of the Honorable Stanley Parness, Justice of the Supreme Court of the State of New York, entered in this action on January 5, 1983, compelling Appellant CLUB MEDITERRANEE, S.A. to respond to certain interrogatories served upon Appellant in contravention of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 28 U.S.C. Section 1781; [1972] 23 U.S.T. 2555; T.I.A.S. No. 7444.

This appeal is taken pursuant to 28 U.S.C. Section 1257(1).

KROLL, POMERANTZ
& CAMERON
Attorneys for Defendant/
Appellant
CLUB MEDITERRANEE, S.A.
and Defendants
CLUB MED, INC. and
SOCIETE GENERALE
500 Fifth Avenue
New York, New York 10110
(212) 921-9080

Notice of Appeal Dated July 21, 1983

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

RAYMOND L. MYLOTT, JR., ESQ., being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 231 East 76th Street, Apt. 7-H, New York, New York 10021.

That on the 20th day of July, 1983, deponent served the within NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES upon:

THOMAS A. DICKERSON, ESQ.
Attorney for Plaintiffs-Respondents
MARJORIE SCHLOSSBERG DORIN
and PHILIP DORIN
545 Fifth Avenue
New York, New York 10017

D'AMATO & LYNCH
Attorneys for Defendant
KENT TRAVEL SERVICE, INC.
70 Pine Street
New York, New York 10005

McCORMICK, DUNNE & FOLEY
Attorneys for Defendant
NATIONAL UNION FIRE INSURANCE COMPANY
71 Broadway
New York, New York 10006

Notice of Appeal Dated July 21, 1983

FEDER, KASZOVITZ, WEBER & SKALA
Attorneys for Defendant
CELEBRITY TRAVEL SERVICE, LTD.
420 Seventh Avenue
New York, New York 10123

in this action at the address designated by said attorney for that purpose by depositing same enclosed in a post paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.

s/ Raymond L. Mylott, Jr.
RAYMOND L. MYLOTT, JR.

Sworn to before me this
20th day of July, 1983

Notary Public

NOTICE OF APPEAL FILED WITH THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY, PURSUANT TO R.10.3 AS BEING THE COURT POSSESSED OF THE RECORD, DATED AND TIME-STAMPED JULY 21, 1983

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

Index No. 4777/82

MAJORIE SCHLOSSBERG DORIN and PHILIP DORIN,

Plaintiffs/Appellees,

vs.

CLUB MEDITERRANEE, S.A., a Foreign Corporation,

Defendant/Appellant.

and

CLUB MED, INC., CELEBRITY TRAVEL SERVICE, LTD., KENT TRAVEL SERVICE, INC., SOCIETE GENERALE and NATIONAL UNION FIRE INSURANCE COMPANY,

Defendants.

NOTICE IS HEREBY GIVEN that CLUB MEDITERRANEE, S.A., the Appellant above-named, hereby appeals to the Supreme Court of the United States from the final

Notice of Appeal Pursuant to R.10.3 Dated July 21, 1983

judgment of the Appellate Division, First Department of the Supreme Court of the State of New York, entered in this action on June 28, 1983, by which it denied leave to Appellant CLUB MEDITERRANEE, S.A. to appeal to the Court of Appeals of the State of New York; thus letting stand its Order, entered in this action on April 26, 1983, affirming the Order of the Honorable Stanley Parness, Justice of the Supreme Court of the State of New York, entered in this action on January 5, 1983, compelling Appellant CLUB MEDITERRANEE, S.A. to respond to certain interrogatories served upon Appellant in contravention of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, 28 U.S.C. Section 1781; [1972] 23 U.S.T. 2555; T.I.A.S. No. 7444.

This appeal is taken pursuant to 28 U.S.C. Section 1257(1).

KROLL, POMERANTZ &
CAMERON
Attorneys for Defendant/Appellant
CLUB MEDITERRANEE, S.A.
and Defendants
CLUB MED, INC. and
SOCIETE GENERALE
500 Fifth Avenue
New York, New York 10110
(212) 921-9080

Notice of Appeal Pursuant to R.10.3 Dated July 21, 1983

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

RAYMOND L. MYLOTT, JR., ESQ., being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 231 East 76th Street, Apt. 7-H, New York, New York 10021.

That on the 20th day of July, 1983, deponent served the within NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES upon:

THOMAS A. DICKERSON, ESQ.
Attorney for Plaintiffs-Respondents
MARJORIE SCHLOSSBERG DORIN
and PHILIP DORIN
545 Fifth Avenue
New York, New York 10017

D'AMATO & LYNCH
Attorneys for Defendant
KENT TRAVEL SERVICE, INC.
70 Pine Street
New York, New York 10005

McCORMICK, DUNNE & FOLEY
Attorneys for Defendant
NATIONAL UNION FIRE INSURANCE COMPANY
71 Broadway
New York, New York 10006

Notice of Appeal Pursuant to R.10.3 Dated July 21, 1983

FEDER, KASZOVITZ, WEBER & SKALA
Attorneys for Defendant
CELEBRITY TRAVEL SERVICE, LTD.
420 Seventh Avenue
New York, New York 10123

in this action at the address designated by said attorney for that purpose by depositing same enclosed in a post paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.

s/ Raymond L. Mylott, Jr.
RAYMOND L. MYLOTT, JR.

Sworn to before me this
20th day of July, 1983

Notary Public

ORDER STAYING DISCOVERY PROCEEDINGS ENTERED BY CHIEF JUSTICE WARREN E. BURGER, DATED JULY 21, 1983

SUPREME COURT OF THE UNITED STATES

No. A-28

CLUB MEDITERRANEE, S.A.,

Appellant,

v.

MAJORIE SCHLOSSBERG DORIN and PHILIP DORIN

UPON CONSIDERATION of the application of counsel for the appellant,

IT IS ORDERED that the effectiveness of the order of the Appellate Division of the Supreme Court of New York, First Judicial Department, case No. 16526 N, entered April 26, 1983, be, and the same is hereby, stayed pending the timely docketing of an appeal in the above-entitled cause. Should such an appeal be so timely docketed, this order is to continue pending this Court's action on the jurisdictional statement. If the appeal is dismissed or the judgment of the Appellate Division of the Supreme Court of New York is affirmed, this order is to terminate automatically. In the event that jurisdiction is noted or postponed, this order is to remain in effect pending the issuance of the mandate of this Court.

Chief Justice of the United States

Dated this 21st
day of July, 1983

CONSTITUTIONAL, TREATY AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Art. VI, cl. 2

This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the Contrary notwithstanding.

FULL TEXT OF CONVENTION ON TAKING EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS, 28 U.S.C. §1781, [1972] 23 U.S.T. 2555, T.I.A.S. 7444 WITH RESERVATIONS, DECLARATIONS, AND EXCEPTIONS FILED BY THE REPUBLIC OF FRANCE

CONVENTION ON TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

The States signatory to the present Convention.

Desiring to facilitate the transmission and execution of Letters of Request and to further the accommodation of the different methods which they use for this purpose.

Desiring to improve mutual judicial co-operation in civil or commercial matters.

Have resolved to conclude a Convention to this effect and have agreed upon the following provisions—

CHAPTER I—LETTERS OF REQUEST

Article 1

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.

A Letter shall not be used to obtain evidence which is not intended for use in judicial proceedings, commenced or contemplated.

The expression 'other judicial act' does not cover the service of judicial documents or the issuance of any process by which judgments or orders are executed or enforced, or orders for provisional or protective measures.

Full Text of Convention on Taking Evidence Abroad in Civil or Commercial Matters

Article 2

A Contracting State shall designate a Central Authority which will undertake to receive Letters of Request coming from a judicial authority of another Contracting State and to transmit them to the authority competent to execute them. Each state shall organize the Central Authority in accordance with its own law.

Letters shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of that State.

Article 3

A Letter of Request shall specify—

(a) the authority requesting its execution and the authority requested to execute it, if known to the requesting authority;

(b) the names and addresses of the parties to the proceedings and their representatives, if any;

(c) the nature of the proceedings for which the evidence is required, giving all necessary information in regard thereto;

(d) the evidence to be obtained or other judicial acts to be performed.

Where appropriate, the Letter shall specify, inter alia—

(e) the names and addresses of the persons to be examined;

(f) the questions to be put to the persons to be examined or a statement of the subject-matter about which they are to be examined;

(g) the documents or other property, real or personal, to be inspected;

(h) any requirement that the evidence is to be given an oath or affirmation, and any special form to be used;

(i) any special method or procedure to be followed under Article 9.

A Letter may also mention any information necessary for the application of Article 11.

No legislation or other like formality may be required.

Article 4

A Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.

Nevertheless, a Contracting State shall accept a Letter in either English or French, or a translation into one of these languages, unless it has made the reservation authorized by Article 33.

A Contracting State which has more than one official language and cannot, for reasons of internal law, accept Letters in one of these languages for the whole of its territory, shall, by declaration, specify the language in which the Letter or translation thereof shall be expressed for execution in the specified parts of its territory. In case of failure to comply with this declaration, without justifiable excuse, the costs of translation into the required language shall be borne by the State of origin.

A Contracting State may, by declaration, specify the language or languages other than those referred to in the preceding paragraphs, in which a Letter may be sent to its Central Authority.

Any translation accompanying a Letter shall be certified as correct, either by a diplomatic officer or consular agent or by a sworn translator or by any other person so authorized in either State.

Article 5

If the Central Authority considers that the request does not comply with the provisions of the present Convention, it shall

promptly inform the authority of the State of origin which transmitted the Letter of Request, specifying the objections to the Letter.

Article 6

If the authority to whom a Letter of Request has been transmitted is not competent to execute it, the Letter shall be sent forthwith to the authority in the same State which is competent to execute it in accordance with the provisions of its own law.

Article 7

The requesting authority shall, if it so desires, be informed of the time when, and the place where, the proceedings will take place, in order that the parties concerned, and their representatives, if any, may be present. This information shall be sent directly to the parties or their representatives when the authority of the State of origin so requests.

Article 8

A Contracting State may declare that members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. Prior authorization by the competent authority designated by the declaring State may be required.

Article 9

The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed.

However, it will follow a request of the requesting authority that a special method or procedure be followed, unless this is incompatible with the internal law of the State of execution or is impossible of performance by reason of its internal practice and procedure or by reason of practical difficulties.

A Letter of Request shall be executed expeditiously.

Article 10

In executing a Letter of Request the requested authority shall apply the appropriate measures of compulsion in the instances and to the same extent as are provided by its internal law for the execution of orders issued by the authorities of its own country or of requests made by parties in internal proceedings.

Article 11

In the execution of a Letter of Request the person concerned may refuse to give evidence in so far as he has a privilege or duty to refuse to give the evidence—

(a) under the law of the State of execution; or

(b) under the law of the State of origin, and the privilege or duty has been specified in the Letter, or, at the instance of the requested authority, has been otherwise confirmed to that authority by the requesting authority.

A Contracting State may declare that, in addition, it will respect privileges and duties existing under the law of States other than the State of origin and the State of execution, to the extent specified in that declaration.

Full Text of Convention on Taking Evidence Abroad in Civil or Commercial Matters

Article 12

The execution of Letter of Request may be refused only to the extent that—

(a) in the State of execution the execution of the Letter does not fall within the functions of the judiciary; or

(b) the State addressed considers that its sovereignty or security would be prejudiced thereby.

Execution may not be refused solely on the ground that under its internal law the State of execution claims exclusive jurisdiction over the subject-matter of the action or that its internal law would not admit a right of action on it.

Article 13

The documents establishing the execution of the Letter of Request shall be sent by the requested authority to the requesting authority by the same channel which was used by the letter.

In every instance where the Letter is not executed in whole or in part, the requesting authority shall be informed immediately through the same channel and advised of the reasons.

Article 14

The execution of the Letter of Request shall not give rise to any reimbursement of taxes or costs of any nature.

Nevertheless, the State of execution has the right to require the State of origin to reimburse the fees paid to experts and interpreters and the costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2.

The requested authority whose law obliges the parties themselves to secure evidence, and which is not able itself to execute

the Letter, may, after having obtained the consent of the requesting authority, appoint a suitable person to do so. When seeking this consent the requested authority shall indicate the approximate costs which would result from this procedure. If the requesting authority gives its consent it shall reimburse any costs incurred; without such consent the requesting authority shall not be liable for the costs.

CHAPTER II—TAKING OF EVIDENCE BY DIPLOMATIC OFFICERS, CONSULAR AGENTS AND COMMISSIONERS

Article 15

In a civil or commercial matter, a diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, take the evidence without compulsion of nationals of a State which he represents in aid of proceedings commenced in the courts of a State which he represents.

A Contracting State may declare that evidence may be taken by a diplomatic officer or consular agent only if permission to that effect is given upon application made by him or on his behalf to the appropriate authority designated by the declaring State.

Article 16

A diplomatic officer or consular agent of a Contracting State may, in the territory of another Contracting State and within the area where he exercises his functions, also take the evidence, without compulsion, of nationals of the State in which he exercises his functions or of a third State, in aid of proceedings commenced in the courts of a State which he represents, if—

Full Text of Convention on Taking Evidence Abroad in Civil or Commercial Matters

(a) a competent authority designated by the State in which he exercises his functions has given its permission either generally or in the particular case, and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 17

In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if—

(a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and

(b) he complies with the conditions which the competent authority has specified in the permission.

A Contracting State may declare that evidence may be taken under this Article without its prior permission.

Article 18

A Contracting State may declare that a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 or 17, may apply to the competent authority designated by the declaring State for appropriate assistance to obtain the evidence by compulsion. The declaration may contain such conditions as the declaring State may see fit to impose.

If the authority grants the application it shall apply any measures of compulsion which are appropriate and are prescribed by its law for use in internal proceedings.

Article 19

The competent authority, in giving the permission referred to in Articles 15, 16 or 17, or in granting the application referred to in Article 18, may lay down such conditions as it deems fit, *inter alia*, as to the time and place of the taking of the evidence. Similarly it may require that it be given reasonable advance notice of the time, date and place of the taking of the evidence: in such a case a representative of the authority shall be entitled to be present at the taking of the evidence.

Article 20

In the taking of evidence under any Article of this Chapter persons concerned may be legally represented.

Article 21

Where a diplomatic officer, consular agent or commissioner is authorized under Articles 15, 16 or 17 to take evidence—

(a) he may take all kinds of evidence which are not incompatible with the law of the State where the evidence is taken or contrary to any permission granted pursuant to the above Articles, and shall have power within such limits to administer an oath or take an affirmation;

(b) a request to a person to appear or to give evidence shall unless the recipient is a national of the State where the action is pending, be drawn up in the language of the place where the

evidence is taken or be accompanied by a translation into such language

(c) the request shall inform the person that he may be legally represented and, in any State that has not filed a declaration under Article 18, shall also inform him that he is not compelled to appear or to give evidence;

(d) the evidence may be taken in the manner provided by the law applicable to the court in which the action is pending provided that such manner is not forbidden by the law of the State where the evidence is taken;

(e) a person requested to give evidence may invoke the privileges and duties to refuse to give the evidence contained in Article 11.

Article 22

The fact that an attempt to take evidence under the procedure laid down in this Chapter has failed, owing to the refusal of a person to give evidence, shall not prevent an application being subsequently made to take the evidence in accordance with Chapter I.

CHAPTER III—GENERAL CLAUSES

Article 23

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

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Article 24

A Contracting State may designate other authorities in addition to the Central Authority and shall determine the extent of their competence. However, Letters of Request may in all cases be sent to the Central Authority.

Federal States shall be free to designate more than one Central Authority.

Article 25

A Contracting State which has more than one legal system may designate the authorities of one of such systems, which shall have exclusive competence to execute Letters of Request pursuant to this Convention.

Article 26

A Contracting State, if required to do so because of constitutional limitations, may request the reimbursement by the State of origin of fees and costs, in connection with the execution of Letters of Request, for the service of process necessary to compel the appearance of a person to give evidence, the costs of attendance of such persons, and the cost of any transcript of the evidence.

Where a State has made a request pursuant to the above paragraph, any other Contracting State may request from that State the reimbursement of similar fees and costs.

Article 27

The provision of the present Convention shall not prevent a Contracting State from—

(a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;

(b) permitting, by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;

(c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention.

Article 28

The present Convention shall not prevent an agreement between any two or more Contracting States to derogate from—

(a) the provisions of Article 2 with respect to methods of transmitting Letters of Request;

(b) the provisions of Article 4 with respect to the languages which may be used;

(c) the provisions of Article 8 with respect to the presence of judicial personnel at the execution of Letters;

(d) the provisions of Article 11 with respect to the privileges and duties of witnesses to refuse to give evidence;

(e) the provisions of Article 13 with respect to the methods of returning executed Letters to the requesting authority;

(f) the provisions of Article 14 with respect to fees and costs;

(g) the provisions of Chapter II.

Article 29

Between Parties to the present Convention who are also Parties to one or both of the Conventions on Civil Procedure signed at the Hague on the 17th of July 1905[1] and the 1st of March 1954,[2] this Convention shall replace Article 8-16 of the earlier Conventions.

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Article 30

The present Convention shall not affect the application of Article 23 of the Convention of 1905, or of Article 24 of the Convention of 1954.

Article 31

Supplementary Agreements between Parties to the Conventions of 1905 and 1954 shall be considered as equally applicable to the present Convention unless the Parties have otherwise agreed.

Article 32

Without prejudice to the provisions of Articles 29 and 31, the present Convention shall not derogate from conventions containing provisions on the matters covered by this Convention to which the Contracting States are, or shall become Parties.

Article 33

A State may, at the time of signature, ratification or accession, exclude, in whole or in part, the application of the provisions of paragraph 2 of Article 4 and of Chapter II. No other reservation shall be permitted.

Each Contracting State may at any time withdraw a reservation it has made; the reservation shall cease to have effect on the sixtieth day after notification of the withdrawal.

When a State has made a reservation, any other State affected thereby may apply the same rule against the reserving State.

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Article 34

A State may at any time withdraw or modify a declaration.

Article 35

A Contracting State shall, at the time of the deposit of its instrument of ratification or accession, or at a later date, inform the Ministry of Foreign Affairs of the Netherlands of the designation of authorities, pursuant to Articles 2, 8, 24 and 25.

A Contracting State shall likewise inform the Ministry, where appropriate, of the following—

(a) the designation of the authorities to whom notice must be given, whose permission may be required, and whose assistance may be invoked in the taking of evidence by diplomatic officers and consular agents, pursuant to Articles 15, 16 and 18 respectively;

(b) the designation of the authorities whose permission may be required in the taking of evidence by commissioners pursuant to Article 17 and of those who may grant the assistance provided for in Article 18;

(c) declarations pursuant to Articles 4, 8, 11, 15, 16, 17, 18, 26 and 27;

(d) any withdrawal or modification of the above designations and declarations;

(e) the withdrawal of any reservation.

Article 36

Any difficulties which may arise between Contracting States in connection with the operation of this Convention shall be settled through diplomatic channels.

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Article 37

The present Convention shall be open for signature by the States represented at the Eleventh Session of the Hague Conference on Private International Law.

It shall be ratified, and the instruments of ratification shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

Article 38

The present Convention shall enter into force on the sixtieth day after the deposit of the third instrument of ratification referred to in the second paragraph of Article 37.

The Convention shall enter into force for each signatory State which ratifies subsequently on the sixtieth day after the deposit of its instrument of ratification.

Article 39

Any State not represented at the Eleventh Session of the Hague Conference on Private International Law which is a Member of this Conference or of the United Nations or of a specialized agency of that Organization, or a Party to the Statute of the International Court of Justice[1] may accede to the present Convention after it has entered into force in accordance with the first paragraph of Article 38.

The instrument of accession shall be deposited with the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for a State acceding to it on the sixtieth day after the deposit of its instrument of accession.

The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of this accession. Such declaration shall be deposited at the Ministry of Foreign Affairs of the Netherlands; this Ministry shall forward, through diplomatic channels, a certified copy to each of the Contracting States.

The Convention will enter into force as between the acceding State and the State that has declared its acceptance of the accession on the sixtieth day after the deposit of the declaration of acceptance.

Article 40

Any State may, at the time of signature, ratification or accession, declare that the present Convention shall extend to all the territories for the international relations of which it is responsible, or to one or more of them. Such a declaration shall take effect on the date of entry into force of the Convention for the State concerned.

At any time thereafter, such extensions shall be notified to the Ministry of Foreign Affairs of the Netherlands.

The Convention shall enter into force for the territories mentioned in such an extension on the sixtieth day after the notification indicated in the preceding paragraph.

Article 41

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 38, even for States which have ratified it or acceded to it subsequently.

If there has been no denunciation, it shall be renewed tacitly every five years.

Any denunciation shall be notified to the Ministry of Foreign Affairs of the Netherlands at least six months before the end of the five year period.

It may be limited to certain of the territories to which the Convention applies.

The denunciation shall have effect only as regards the State which has notified it. The Convention shall remain in force for the other Contracting States.

Article 42

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 37, and to the States which have acceded in accordance with Article 39, of the following—

(a) the signatures and ratifications referred to in Article 37;

(b) the date on which the present Convention enters into force in accordance with the first paragraph of Article 38;

(c) the accessions referred to in Article 39 and the dates on which they take effect;

(d) the extensions referred to in Article 40 and the dates on which they take effect;

(e) the designations, reservations and declarations referred to in Articles 33 and 35;

(f) the denunciations referred to in the third paragraph of Article 41;

IN WITNESS WHEREOF the undersigned, being duly authorized thereto, have signed the present Convention.

DONE at The Hague, on the 18th day of March 1970, in the English and French languages, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Government of the Netherlands, and of which a certified

copy shall be sent, through the diplomatic channel, to each of the States represented at the Eleventh Session of the Hague Conference on Private International Law.
[Signatures omitted.]

Convention on the taking of evidence abroad in civil or commercial matters. Done at The Hague March 18, 1970; entered into force for the United States October 7, 1972.
TIAS 7444; 23 UST 2555
States which are parties:
Barbados
Czechoslovakia-1
Denmark-1a
Finland-2
France-2a
Federal Republic of Germany-2b
Israel-2c
Luxemburg-2d
Netherlands-2e
Norway-3
Portugal-3a
Singapore-3b
Sweden-3c
United Kingdom-3d
United States-4

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1. With the following declaration:
(Translation)

"The Socialist Republic of Czechoslovakia declares, with reference to Article 16 of the Convention on the taking of evidence abroad in civil or commercial matters, concluded at The Hague on 18 March 1970, that evidence may be taken in accordance with

Chapter II without its prior permission provided the principle of reciprocity is applied.

The Socialist Republic of Czechoslovakia also declares, in connection with Article 18 of the said Convention, that a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 and 17, may request the competent Czechoslovak court or the Czechoslovak state notary to carry out procedural action and that such a diplomatic officer, consular agent or commissioner will transmit the dossier to that court or notary through the intermediary of the Minister of Justice of the Czech Socialist Republic in Prague or the Minister of Justice of the Slovak Socialist Republic in Bratislava, provided the principle of reciprocity is applied.

The Socialist Republic of Czechoslovakia wishes to state, in connection with Article 40 of the Convention according to all states the right to declare that the convention shall be applicable to all territories for the international relations of which it is responsible, that keeping certain countries in a state of dependence is in its opinion contrary to the spirit and objectives of the United Nations Declaration of 14 December 1960 on the granting of independence to colonial countries and peoples, which declares the necessity for a speedy and unconditional end to colonialism in all its forms".

By notification contained in Note dated May 28, 1978, the Minister of Justice of the Czech Socialist Republic and the Minister of Justice of Slovak Socialist Republic have been designated as central authorities in accordance with Articles 2 and 24 of the Convention.

1a. With the following reservations:

"1) Availing itself of the provisions laid down in Article 33, the Danish Government hereby declares, in accordance with Article

4, that Denmark will not accept Letters of Request which are sent in French.

2) Availing itself of the provisions laid down in Article 33, the Danish Government hereby declares, in accordance with Article 17, that Denmark will not accept the taking of evidence by commissioners."

And with the following declarations in accordance Article 35:

"Article 2

The Ministry of Justice is hereby designated as Central Authority.

Article 4

Letters of Request may be sent in Norwegian and Swedish, and Denmark accepts no obligation to return evidence taken in other languages than Danish.

Article 8

Members of the judicial personnel of the requesting authority of another contracting State may be present at the execution of a Letter of Request if they have obtained prior authorization from the competent Danish authority.

Article 15

A diplomatic officer or consular agent may take evidence if he has been authorized to do so by the Ministry of Justice.

Article 16

The Ministry of Justice will issue authorizations to take evidence.

Article 23

Letters of Requests issued for the purpose of obtaining pre-trial discovery of documents may not be executed in Denmark.

Article 27a

As has been the case hitherto, Letters of Request may be transmitted directly to the competent Danish court by the consular agents of foreign States."

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Additional declaration of July 23, 1980:

"The declaration made by the Kingdom of Denmark in accordance with article 23 concerning 'Letters of Request issued for the purpose of obtaining pre-trial discovery of documents' shall apply to any Letter of Request which requires a person:

a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, other than particular documents specified in the Letter of Request: or

b) to produce any documents other than particular documents which are specified in the Letter of Request, and which are likely to be in his possession."

2. With the following reservation and declaration:

Reservation:

"In conformity with Article 33. Finland enters a reservation to paragraph 2 of Article 4 to the effect that Letters of Request in the English or French languages will not be accepted."

Declaration:

"1. In Finland the Ministry for Foreign Affairs shall be the Central Authority referred to in Article 2.

2. Swedish is the second official language of Finland. Finland will therefore in accordance with paragraph 1 of Article 4 accept Letters of Request in the Swedish language. The answer shall be given in the Swedish language if in connection with the Letter of Request this has been specifically requested.

3. A member of the judicial personnel of the requesting authority may in accordance with Article 8 be present at the execution of a Letter of Request, provided that the Finnish Ministry of Justice has given its consent.

4. The evidence referred to in Article 16 and 17 of the Convention may be taken without the prior permission of the Finnish authorities.

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5. Finland is not going to execute Letters of Request referred to in Article 23 issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."

Notification in conformity with Article 42, paragraph c, of the Convention

By note dated 11 December 1980 and received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on 12 December 1980 the Government of Finland informed the Ministry of the withdrawal in part of the reservation to Article 4, paragraph 2, of the above-mentioned Convention made at the time of ratification and declared that it hereafter accepts the Letters of Request done in or translated into the English language. In accordance with Article 35, sub. c, the Government of Finland made the following declaration:

> "By accepting Letters of Request in English, the Republic of Finland does not undertake to execute the request, or transmit the evidence thus obtained in the English language; nor to have translated the documents which establish the execution of the Letter of Request."

Furthermore, the Government of Finland modified the declaration concerning Article 23 of the above-mentioned Convention made at the time of ratification. The modified declaration is worded as follows:

"The declaration made by the Republic of Finland in accordance with Article 23 concerning "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" shall apply only to Letters of Request which require a person:

a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power:

b) to produce any documents other than particular documents specified in the Letter of Request which are likely to be in his possession, custody or power."

2a-With the following declarations:

With respect to the first paragraph of Article 40 of the Convention. France declares that the Convention shall apply to all the Territory of the French Republic.

In conformity with the provisions of Article 33 , the French Government declares:

That, in application of the second paragraph of Article 4, it will execute only Letters in French or accompanied by a translation in French.

That, in application of Article 23, it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries:

In conformity with the provisions of Article 2, the Ministry of Justice Civil Division of International Judicial Assistance, 13 Place Vendome, Paris (ler), is designated as the Central Authority to the exclusion of any other authority.

In conformity with the provisions of Article 16, the Ministry of Justice, Civil Division of International Judicial Assistance, 13 Place Vendome, Paris (ler), is designated as the competent authority to give permission to diplomatic officers or consular agents of a Contracting State to take the evidence, without compulsion, of persons other than nationals of that State in aid of proceedings commenced in the courts of a State which they represent.

That permission, which shall be given for each specific case and shall be accompanied by special conditions when appropriate, shall be granted under the following general conditions:

1. Evidence shall be taken only within the confines of the Embassies or Consulates:

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2. The date and time of taking the evidence shall be notified in due time to the Civil Division of International Judicial Assistance so that it may have the opportunity to be represented at the proceedings:

3. Evidence shall be taken in premises accessible to the public:

4. Persons requested to give evidence shall be served with an official instrument in French or accompanied by a translation into French, and that instrument shall mention:

a. That evidence is being taken in conformity with the provisions of The Hague Convention of March 15, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters and relates to legal proceedings pending before a jurisdiction specifically designated by a Contracting State.

b. That appearance is voluntary and failure to appear will not give rise to criminal proceedings in the State of origin;

c. That the parties to the trial are consenting or, if not, the grounds of their objections;

d. That in the taking of evidence the person concerned may be legally represented;

e. That a person requested to give evidence may invoke a privilege or duty to refuse to give evidence.

A copy of these requests shall be transmitted to the Ministry of Justice.

5. The Civil Division of International Judicial Assistance shall be kept informed of any difficulty.

In conformity with the provisions of Article 17, the Ministry of Justice, Civil Division of International Judicial Assistance, 13 Place, Vendome, Paris (ler), is appointed as the competent authority to give permission to persons duly appointed as commissioners to proceed, without compulsion, to take any evidence in aid of proceedings commenced in the courts of a Contracting State.

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This permission, which shall be given for each specific case and shall be accompanied by special conditions when appropriate, shall be granted under the following general conditions:

1. Evidence shall be taken only within the Embassy confines;

2. The date and time of taking the evidence shall be notified in due time to the Civil Division of International Judicial Assistance so that it may have the opportunity to be represented at the proceedings;

3. Evidence shall be taken in premises accessible to the public;

4. Persons requested to give evidence shall be served with an official instrument in French or accompanied by a translation in French, and that instrument shall mention:

a. That evidence is being taken in conformity with the provisions of The Hague Convention of March 18, 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters and relates to legal proceedings pending before a jurisdiction specifically designated by a Contracting State;

b. That appearance is voluntary and failure to appear will not give rise to criminal proceedings in the State of origin;

c. That the parties to the trial are consenting and, if not, the grounds of their objections;

d. That in the taking of evidence the person concerned may be legally represented;

e. That a person requested to give evidence may invoke the privilege and duty to refuse to give evidence.

A copy of these requests shall be transmitted to the Ministry of Justice.

5. The Civil Division of International Judicial Assistance shall be kept informed of any difficulty.

The request for permission transmitted by the requesting authority to the Ministry of Justice shall specify:

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1. The motives that led to choosing this method of taking evidence in preference to that of a Letter of Request, considering the judiciary costs incurred;

2. The criteria for appointing commissioners when the person appointed does not reside in France.

The French Government declares that, in application of the provisions of Article 8, members of the judicial personnel of the requesting authority of a Contracting State may be present at the execution of a Letter of Request.

2b-"A. The Government of the Federal Republic of Germany makes the following declarations in accordance with paragraph 1 of Article 33 of the Convention of 18th March 1970:

The Federal Republic of Germany makes the reservation provided for in the first sentence of paragraph 1 of Article 33 of the Convention excluding the application of the provisions of paragraph 2 of Article 4 of the Convention. Letters of Request to be executed under Chapter 1 of the Convention must, in accordance with paragraphs 1 and 5 of Article 4 of the Convention, be in the German language or be accompanied by a translation into that language.

The Federal Republic of Germany declares in accordance with the option provided for in the first sentence of paragraph 1 of Article 33 of the Convention to make a reservation excluding the application of the provisions of Chapter 11 of the Convention that the taking of evidence by diplomatic officers or consular agents is not permissible in its territory if German nationals are involved.

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B. The Government of the Federal Republic of Germany makes the following declarations pursuant to Article 35 of the Convention of 18th March 1970:

(1) The authority competent to execute a Letter of Request shall be the local court (Amtsgericht) in whose district the official act is to be performed.

Letter of Request in the same matter addressed to the Central Authority of the Land in which the respective request is to be executed. The Central Authority pursuant to Article 2 and paragraph 2 of Article 24 of the Convention shall be for

Baden-Wurttemberg — das Justizministerium Baden-Wurttemberg (The Ministry of Justice of Baden-Wurttemberg), D 7000 Stuttgart

Bavaria — das Bayerische Staatsministerium der Justiz (The Bavarian State Ministry of Justice), D 8000 Munchen der Senator fur Justiz (The Senator of Justice), D 1000 Berlin

Bremen — der Prasident des Landgerichts Bremen (The President of the Regional Court of Bremen), D 2800 Bremen

Hamburg — der Prasident des Amtsgerichts Hamburg (The President of the Local Court of Hamburg), D 2000 Hamburg

Hesse — der Hessische Minister der Justiz (The Hessian Minister of Justice), D 6200 Wiesbaden

Lower Saxony — der Niedersachsische Minister der Justiz (The Minister of Justice of Lower Saxony), D 3000 Hannover

Northrhine-Westphalia — der Justizminister des Landes Nordrhein-Westfalen (The Minister of Justice of the Land Northrhine-Westphalia), D 4000 Dusseldorf

Rhineland-Palatinate — das Ministerium der Justiz (The Ministry of Justice), D 6500 Mainz

Saarland — der Minister fur Rechtspilege (The Minister of Justice), D 6600 Saarbrucken

Schleswig-Holstein — der Justizminister des Landes Schleswig-Holstein (The Minister of Justice of the Land Schleswig-Holstein), D 2300 Kiel

(2) Pursuant to Article 8 of the Convention, the Government of the Federal Republic of Germany declares that members of the requesting court of another Contracting State may be present at the execution of a Letter of Request by the local court if prior authorization has been given by the Central Authority of the Land where the request is to be executed.

(3) The taking of evidence by diplomatic officers or consular agents pursuant to paragraph 1 of Article 16 of the Convention which involves nationals of a third State or stateless persons shall be subject to permission from the Central Authority of the Land where the evidence is to be taken. Pursuant to paragraph 2 of Article 16 of the Convention, permission shall not be required if the national of the third State is also a national of the State of the requesting court.

(4) A commissioner of the requesting court may not take evidence pursuant to Article 17 of the Convention unless the Central Authority of

the Land where the evidence is to be taken has given its permission. Such permission may be made subject to conditions. The local court in whose district official acts would have to be performed by virtue of a Letters of Request shall be ad-ter [sic] shall be entitled to control the preparation and the actual taking of the evidence. Under the second sentence of Article 19 of the Convention, a member of the court may be present at the taking of the evidence.

(5) The Federal Republic of Germany declares in pursuance of Article 23 of the Convention that it will not in its territory, execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."

2c-*Notification in conformity with Article 42, paragraph c, of the Convention*

In accordance with Article 35 of the Convention Israel notified by a Note dated April 17, 1980 and received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on April 25, 1980, that the Central Authority designated by the State of Israel in accordance with Article 2 of the above-mentioned Convention, is the Director of Courts, 19 Jaffa Road, Jerusalem.

2d-*Notification in accordance with Article 42, sub a and e, of the Convention*

In accordance with Article 37, paragraph 2, Luxemburg deposited on 26 July 1977 its instrument of ratification of the Convention with the Ministry of Foreign Affairs of the Kingdom of the Netherlands.

In conformity with Article 38, paragraph 2, the Convention shall enter into force for Luxemburg on 24 September 1977.

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On the occasion of the deposit of the said instrument of ratification the Government of Luxemburg made the following declarations and reservations (translation):

"—In accordance with Article 2 the Parquet General is designated as the Central Authority.

—In pursuance of Article 4, paragraph 4, Letters of Request in German shall also be accepted.

—In pursuance of Article 23, Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries shall not be executed.

—In accordance with the provisions of Article 16, the Parquet General is designated as the authority competent to authorize the diplomatic officers or consular agents of a Contracting State to take, without compulsion, the evidence of persons other than the nationals of that State in aid of proceedings commenced in the courts of the State which they represent.

This authorization, which is given in each specific case and to which specific conditions, where appropriate, are attached, is granted under the following general conditions:

1—The evidence shall be taken only within the precincts of an Embassy or Consultate.

2—The Parquet General shall be given reasonable advance notice of the time, date and place of the taking of evidence so that it can, if it wishes, be represented.

3—A request to a person to appear shall, in accordance with the regulations, be in the form

of an official document in French or German or accompanied by an (sic) translation into one of these languages stating:

a) that the evidence is to be taken in accordance with the provisions of the Convention on the taking of evidence abroad in civil or commercial matters concluded at The Hague on 18 March 1970, and in the framework of a judicial procedure followed in a jurisdiction designated by a Contracting State;

b) that the appearance is voluntary and that no prosecution in the requesting State will result from failure to appear;

c) that the parties to the action, where appropriate, consent to the taking of the evidence or are opposed to it for reasons to be given;

d) that the person requested to appear may be legally represented;

e) that the person requested to appear may invoke a privilege or a duty to refuse to give evidence.

—In accordance with the provisions of Article 17, the Parquet General is designated as the authority competent to authorize persons designated in accordance with the regulations as commissioners to take evidence, without compulsion, in aid of proceedings commenced in the courts of another Contracting State.

This authorization, which is given in the particular case and to which specific conditions, where appropriate, are attached, is granted under the following general conditions:

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1—The Parquet General shall be given reasonable advance notice of the time, date and place of the taking of evidence so that it can, if it wishes, be represented.

2—A request to a person to appear shall, in accordance with the regulations, be in the form of an official document in French or German or accompanied by a translation into one of these languages stating:

a) that the evidence is to be taken in accordance with the provisions of the Convention on the taking of evidence abroad in civil or commercial matters concluded at The Hague on 18 March 1970, and in the framework of a judicial procedure followed in a jurisdiction designated by a Contracting State;

b) that the appearance is voluntary and that no prosecution in the requesting State will result from failure to appear;

c) that the parties to the action, where appropriate, consent to the taking of the evidence or are opposed to it for reasons to be given;

d) that the person requested to appear may be legally represented;

e) that the person requested to appear may invoke a privilege or a duty to refuse to give evidence.

—In pursuance of Article 8, members of the judicial personnel of the requesting authority of a Contracting State may be present at the execution of a Letter of Request."

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2e-*Notification in conformity with Article 42, sub a and e, of the Convention.*

"The Kingdom of the Netherlands deposited on 8 April 1981, in accordance with Article 37, paragraph 2, of the Convention its instrument of ratification for the Kingdom in Europe of the above-mentioned Convention.

Upon the deposit of the instrument of ratification the Government of the Kingdom of the Netherlands has made the following declarations:

Translation

In the Netherlands the Convention shall be applied as follows:

Article 2

The Public Prosecutor at The Hague district Court is designated as the Central Authority.

Article 4

Letters of Request will be accepted in Dutch, German, English or French, or if they are accompanied by a translation into one of these languages.

The Netherlands does not undertake to translate documents for the execution of a Letter of Request.

Article 8

Members of the judicial personnel of another Contracting State may be present at the execution

of a Letter of Request provided that the court which is responsible for execution authorizes this and provided that any conditions which the court may impose are respected.

Article 11

Only the court which is responsible for executing the Letter of Request shall be competent to decide whether any person concerned by the execution has a privilege or duty to refuse to give evidence under the law of a State other than the State of origin; no such privilege or duty exists under Dutch law.

Article 14

Fees paid to experts and interpreters and costs occasioned by the use of a special procedure requested by the State of origin under Article 9, paragraph 2 of the Convention shall be borne by the State of origin.

Article 16

In the Netherlands, no prior permission is required for the taking of evidence as provided for in Article 16.

Article 17

The permission referred to in Article 17 must be requested from the President of the District Court

in the area in which evidence is to be taken. If evidence is to be taken from witnesses or experts, the area in question will be that in which the witnesses or experts, or the majority of them, reside. If the President gives permission, he may impose any conditions which he considers necessary to ensure that the evidence is taken in a proper manner. He may decide that the evidence should be taken at the court, under the supervision of a judge designated by him. Permission will only be granted if the following conditions are met:

a) the witness or expert concerned must have been duly summoned; the summons must be in Dutch or must be accompanied by a Dutch translation and must contain:

—the facts of the case and a summary of the proceedings in connection with which the evidence is to be taken, and details of the court which has requested the evidence;

—a statement to the effect that there is no obligation for the witness or expert to appear, and that if he refuses to appear, to take an oath, to give his word of honour or to give evidence, he will not incur any penalty or measure of any kind, either in the Netherlands on in the State where the proceedings have been instituted;

—a statement to the effect that the person concerned may be legally represented;

—a statement to the effect that in so far as the person concerned has a privilege or duty to refuse to give evidence, he may do so;

—a statement to the effect that the commissioner will reimburse expenses incurred by

the witness or expert in connection with his appearance to give evidence.

b) A copy of the summons must be forwarded to the President.

c) The request for permission must state the reasons why the taking of evidence has been entrusted to a commissioner and it must state the commissioner's official status unless he is a lawyer competent to practise in the Netherlands.

d) The costs of taking the evidence, i.e. the expenses of the witnesses, experts or interpreters, must be reimbursed in full.

Article 23

The Netherlands will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries.

For the purposes of Article 23 of the Convention. "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries", which the Netherlands will not execute, are defined by the Government of the Kingdom of the Netherlands as being any Letters of Request which require a person:

a. to state which of the documents which are of relevance to the proceedings to which the Letter of Request relates have been in his possession, custody or power; or

b. to produce any document other than particular documents specified in the Letter of

Request as being documents which the court which is conducting the proceedings believes to be in his possession, custody or power.

Article 26

The Netherlands will request that any State of origin which has made a request pursuant to paragraph 1 of Article 26 should reimburse the fees and costs to which this paragraph refers.

In accordance with Article 38, paragraph 2, the Convention will enter into force for the Kingdom of the Netherlands (the Kingdom in Europe) on 7 June 1981."

3-With the following reservation:

"In conformity with article 33, Norway enters a reservation to paragraph 2 of article 4 to the effect that Letters of Request in the French language will not be accepted."

And with the following declarations:

"I. The Royal Ministry of Justice and Police is designated as the Central Authority with reference to article 2 and as the Competent Authority with reference to articles 15, 16 and 17.

II. With reference to article 4, paragraph 3, the Kingdom of Norway declares that letters in the Danish or Swedish languages can be sent to the Central Authority.

III. By accepting Letters of Request in another language than the Norwegian, the Kingdom of Norway does not undertake to execute the request, or transmit the evidence thus obtained

in this other language; nor to have translated the documents which establish the execution of the letter of request.

IV. By virtue of article 15, evidence can be taken by diplomatic officers or consular agents only if, upon application, prior permission to that effect has been granted.

V. By virtue of article 23, the Kingdom of Norway declares that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries."

The declaration made by the Kingdom of Norway in accordance with article 23 concerning "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" shall apply only to Letters of Request which require a person

a) to state what documents relevant to the proceedings to which the Letter of Request relates, are, or have been, in his possession, other than particular documents specified in the Letter of Request; or

b) to produce any documents other than particular documents which are specified in the Letter of Request, and which are likely to be in his possession.

3a-With the following reservations and declarations:

(Translation)

"a) In accordance with Article 33 of the Convention, the Portuguese State makes the following reservations:

1. exclusion of the application of paragraph 2 of Article 4;

2. exclusion of the application of Chapter II, with the exception of Article 15.

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b) In accordance with Articles 15 and 23 of the Convention, the Portuguese State makes the following declarations:

1. The Portuguese State declares that the evidence as referred to in Article 15, can only be taken if permission to that effect is given by the appropriate authority designated by it upon application made by the diplomatic or consular agent;

2. The Portuguese State declares that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law Countries.

c) With regard to Articles 2 and 15 of the Convention, the competent Portuguese authority will be the Director-General of the Judiciary Department (''Direcgao-Geral dos Servicos Judiciaros'') of the Ministry of Justice.''

3b-In accordance with Article 39, paragraph 3, the Convention shall enter into force for the Republic of Singapore on December 26, 1978.

Notification in accordance with Convention Article 42(c) and (e):

On October 27, 1978, the Ministry of Foreign Affairs of the Kingdom of the Netherlands received the instrument of accession of the Republic of Singapore to the Convention on the Taking of Evidence Abroad in Civil and Commercial Matters in accordance with Article 39, Paragraph 2, of the aforesaid Convention.

At the time of its accession the Government of the Republic of Singapore made the following reservations:

''(i) The entire Chapter II of the Convention is not applicable to the Republic of Singapore; and

(ii) With regard to Article 4, paragraph 2, the Republic of Singapore will not accept a Letter of Request in a language other than English, since this language is the one used by the judicial personnel in Singapore."

In accordance with Article 23 the Government of the Republic of Singapore has declared that the Republic of Singapore will not execute Letters of Request issued for the purpose of obtaining pretrial discovery of documents as known in Common Law countries.

The Government of the Republic of Singapore has further declared that it understands "Letters of Request issued for the purpose of obtaining pretrial discovery of documents" for the purposes of the foregoing declaration as including any Letter of Request which requires a person:

(a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

(b) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or likely to be, in his possession, custody or power. It is also understood that the to civil or commercial actions in the Convention does not include tax matters for the Republic of Singapore.

In accordance with Article 39, paragraph 3, the Convention shall enter into force for the Republic of Singapore on December 26, 1978.

The accession shall be effective only for relations between the Republic of Singapore and contracting States that declare that they accept this accession.

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Notification in conformity with Article 42, paragraph e, of the Convention:

In accordance with Article 35 of the Convention Singapore notified the Ministry of Foreign Affairs of the Kingdom of the Netherlands by a Note dated August 4, 1979, that the Central Authority which will undertake to receive Letters of Request referred to in Article 2 of the convention, is the Registrar of the Supreme Court.

3c-With the following declarations:

(Translation)

—That, in pursuance of Article 4, para. 4, Letters of Request in the Danish and Norwegian languages will be accepted;

—That, in pursuance of Article 8, members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request without prior authorization;

—That, in pursuance of Article 15, para. 2, a diplomatic officer or consular agent may only take evidence if permission to do so has been granted by the competent Swedish authority;

—That, in pursuance of Article 23, Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries will not be executed;

—That documents provided by Sweden which establish that a Letter of Request has been executed will be in the Swedish language only.

Ministry of Foreign Affairs, Stockholm, has been designated as the Central Authority referred to in Article 2 and also as the Competent Authority referred in Article 15-17.

Additional declaration of July 11, 1980:

> "The Swedish Government understands 'Letters of Request issued for the purpose of pre-trial discovery of documents' for the purposes of the foregoing Declaration as including any Letter of Request which requires a person:

> a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or
>
> b) to produce any documents other than particular documents specified in the Letter of Request, which are likely to be in his possession, custody or power."

3d-Notification in conformity with Article 42, under a and e of the Convention:

In accordance with Article 37, paragraph 2, the United Kingdom of Great Britain and Northern Ireland deposited on July 16, 1976 its instrument of ratification with the Ministry of Foreign Affairs of the Netherlands.

In conformity with Article 38, paragraph 2, the Convention shall enter into force for the United Kingdom on September 14, 1976.

The instrument of ratification mentioned above, contains the following reservation: ". . . . in accordance with the provisions of Article 33 the United Kingdom will not accept a Letter of Request in French."

On the occasion of the deposit of the said instrument of ratification the Government of the United Kingdom of Great Britain and Northern Ireland made the following declarations:

> 1. In accordance with Article 8 Her Majesty's Government declare that members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request.
>
> 2. In accordance with Article 18 Her Majesty's Government declare that a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 and 17 of the Convention may apply to the competent

authority in Gibraltar designated hereinbefore for appropriate assistance to obtain such evidence by compulsion provided that the Contracting State whose diplomatic officer, consular agent or commissioner makes the application has made a declaration affording reciprocal facilities under Article 18.

3. In accordance with Article 23, Her Majesty's Government declare that the United Kingdom will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. Her Majesty's Government further declare that Her Majesty's Government understand "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" for the purposes of the foregoing Declaration as including any Letter of Request which requires a person—

a. to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody, or power; or

b. to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or to be likely to be, in his possession, custody or power.

4. In accordance with Article 27 Her Majesty's Government declare that by the law and practice of the United Kingdom the prior permission referred to in Articles 16 and 17 is not required in respect of diplomatic officers, consular

> agents or commissioners of a Contracting State which does not require permission to be obtained for the purposes of taking evidence under Articles 16 and 17."

In accordance with Article 35 of the Convention, the Government of the United Kingdom made the following designations:

1. Under Article 2: the Foreign and Commonwealth Office.
2. Under Article 16: the Foreign and Commonwealth Office.
3. Under Article 17: the Foreign and Commonwealth Office.
4. Under Article 18: the Senior Master of the Supreme Court (Queen's Bench Division) for England and Wales; the Crown Agent for Scotland, for Scotland; the Registrar of the Supreme Court of Northern Ireland, for Northern Ireland.
5. Under Article 24: the Senior Master of the Supreme Court (Queen's Bench Division) in England and Wales; the Crown Agent for Scotland, for Scotland: the Registrar of the Supreme Court of Northern Ireland in Northern Ireland.

By notification received on June 23, 1978 by the Ministry of Foreign Affairs of the Netherlands, the Convention was extended to Hong Kong effective Aug. 22, 1978, with the following declaration:

> "(a) In accordance with the provisions of article 4 and article 38 of the Convention. Hong Kong will not accept a Letter of Request in French.
>
> (b) In accordance with article 35 and article 24 of the Convention, the Registrar of the Supreme Court of Hong Kong is designated as an additional authority competent to receive Letters of Request for execution in Hong Kong.
>
> (c) In accordance with article 35 and articles 16 and 17 of the Convention, the Chief Secretary is designated as the competent authority of Hong Kong."

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Extension to Gibraltar—

In accordance with Article 40, Paragraph 3, the Convention shall enter into force for Gibraltar on January 20, 1979.

The extension declaration contains the following reservation: "In accordance with the provisions of Article 4 and Article 33 of the Convention. Gibraltar will not accept a Letter of Request in French."

In accordance with Article 35 of the Convention the following designations have been made:

> "(a) Under Articles 16 and 17 of the Convention, the Deputy Governor is designated as the competent authority for Gibraltar;
>
> "(b) Under Article 18 of the Convention, the Registrar of the Supreme Court of Gibraltar is designated as the competent authority;
>
> "(c) Under Article 24 of the Convention, the Deputy Governor is designated as an additional authority competent to receive Letters of Request for execution in Gibraltar."

[For declarations see the original note.]

Notification in conformity with article 42, sub d and e, of the Convention

By a letter dated November 20, 1978, and received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on November 21, 1978, the Ambassador of the United Kingdom of Great Britain and Northern Ireland at The Hague, referring to the deposit on July 16, 1976 of the instrument of ratification of the above-mentioned Convention by the United Kingdom of Great Britain and Northern Ireland, declared in accordance with article 40 that the Convention shall extend to Gibraltar. The Convention shall enter into force for Gibraltar on January 20, 1979.

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The declaration of extension contains the following reservation:

> ". . . in accordance with the provisions of Article 4 and Article 33 of the Convention, Gibraltar will not accept a Letter of Request in French."

In accordance with Article 35 of the Convention the following designations have been made:

a) under Articles 16 and 17 of the Convention the Deputy Governor is designated as the competent authority for Gibraltar;

b) under Article 18 of the Convention, the Registrar of the Supreme Court of Gibraltar is designated as the competent authority;

c) under Article 24 of the Convention, the Deputy Governor is designated as an additional authority competent to receive Letters of Request for execution in Gibraltar, and the following declarations:

1. In accordance with Article 8, members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request in Gibraltar.

2. In accordance with Article 18, a diplomatic officer, consular agent or commissioner authorized to take evidence under Articles 15, 16 and 17 of the Convention may apply to the competent authority in Gibraltar designated hereinbefore for appropriate assistance to obtain such evidence by compulsion provided that the Contracting State whose diplomatic officer, consular agent or commissioner makes the application has made a declaration affording reciprocal facilities under Article 18.

3. In accordance with Article 23, Gibraltar will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. The Government of Gibraltar understands "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" for the purposes of the foregoing

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Declaration as including any Letter of Request which requires a person:

a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

b) to produce any documents either than particular documents specified in the Letter of Request as being documents appearing to the request court to be, or likely to be, in his possession, custody or power.

4. In accordance with Article 27, by the law and practice of Gibraltar the prior permission referred to in Articles 16 and 17 of the Convention is not requried in respect of diplomatic officers, consular agents or commissioners of a Contracting State which does not require permission to be obtained for the purposes of taking evidence under Article 16 or 17.

Extension to Sovereign Base Areas of Akrotiri and Dhekelia in the Island of Cyprus—

"The Convention shall enter into force for the Sovereign Base Areas of Akrotiri and Dhekelia in the Island of Cyprus on August 24, 1979.

The declaration of extension contains the following reservation:

". . . in accordance with the provisions of Article 4 and Article 33 of the Convention, the Sovereign Base Areas will not accept a Letter of Request in French."

In accordance with Article 35 of the Convention the following designations have been made:

a) under Articles 16 and 17 of the Convention the Chief Officer, Sovereign Base Areas, is

designated as the competent authority for the Sovereign Base Areas;

b) under Article 18 of the Convention, the Senior Registrar of the Judge's Court of the Sovereign Base Areas of Akrotiri and Dhekelia is designated as the competent authority;

c) under Article 24 of the Convention, the Senior Registrar of the Judge's Court of the Sovereign Base Areas of Akrotiri and Dhekelia is designated as an additional authority competent to receive Letters of Request for execution in the Sovereign Base Areas.

and the following declarations:

1. In accordance with Article 8, members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request in the Sovereign Base Areas.

2. In accordance with Article 18, a diplomatic officer, consular agent or commissioner authorized to take evidence under Article 15, 16 and 17 of the Convention may apply to the competent authority in the Sovereign Base Areas designated hereinbefore for appropriate assistance to obtain such evidence by compulsion provided that the Contracting State whose diplomatic officer, consular agent or commissioner makes the application has made a declaration affording reciprocal facilities under Article 18.

3. In accordance with Article 23, the Sovereign Base Areas will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. The Administration

of the Sovereign Base Areas understands "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" for the purposes of the foregoing Declaration as including any Letter of Request which requires a person:

a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

b) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or likely to be, in his possession, custody or power.

4. In accordance with Article 27, by the law and practice of the Sovereign Base Areas the prior permission referred to in Articles 16 and 17 of the Convention is not required in respect of diplomatic officers, consular agents or commissioners of a Contracting State which does not require permission to be obtained for the purposes of taking evidence under Articles 16 or 17."

Extension to Falkland Islands and Dependencies—Notification in conformity with Article 42, sub d and e, of the Convention

By a letter dated November 23, 1979, and received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on November 26, 1979, the Ambassador of the United Kingdom of Great Britain and Northern Ireland at The Hague referring to the deposit on July 16, 1976 of the instrument of ratification of the above-mentioned Convention by the United Kingdom of Great Britain and Northern Ireland, declared in accordance with

Article 40 that the Convention shall extend to the Falkland Islands and Dependencies.

The Convention shall enter into force for the Falkland Islands and Dependencies on January 25, 1980.

The declaration of extension contains the following reservations:

". . . in accordance with the provisions of Article 4 and Article 33 of the Convention, the Falkland Islands and Dependencies will not accept a Letter of Request in French." In accordance with Article 35 of the Convention the following designations have been made:

a) under Articles 16, 17 and 18 of the Convention the Judge of the Supreme Court of the Falkland Islands, is designated as the competent authority for the Falkland Islands and Dependencies;

b) under Article 24 of the Convention, the Governor of the Falkland Islands and its dependencies is designated as an additional authority competent to receive Letters of Request for execution in the Falkland Islands and Dependencies.

and the following declarations:

1. In accordance with Article 8, members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request in the Falkland Islands and Dependencies.

2. In accordance with Article 18, a diplomatic officer, consular agent or commissioner authorized to take evidence under Article 15, 16 and 17 of the Convention may apply to the competent authority in the Falkland Islands and Dependencies designated hereinbefore for appropriate assistance to obtain such evidence by compulsion provided that the Contracting State whose diplomatic officer, consular agent or commissioner makes the application has made a declaration affording reciprocal facilities under Article 18.

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3. In accordance with Article 23, the Falkland Islands and Dependencies will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents.

The Governor of the Falkland Islands and its dependencies understands "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" for the purposes of the foregoing declaration as including any Letter of Request which requires a person:

a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

b) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or likely to be, in his possession, custody or power.

4. In accordance with Article 27, by the law and practice of the Falkland Islands and Dependencies the prior permission referred to in Articles 16 and 17 of the Convention is not required in respect of diplomatic officers, consular agents or commissioners of a Contracting State which does not require permission to be obtained for the purposes of taking evidence under Articles 16 or 17.

Extension to Isle of Man.—

Notification is conformity with Article 42, sub d and e, of the Convention.

By a letter dated April 16, 1980, and received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on April 16, 1980, the Ambassador of the United Kingdom of Great Britain and Northern Ireland at The Hague, referring to the deposit on July 16, 1976 of the instrument of ratification of the above-mentioned Convention by the United Kingdom of Great Britain and Northern Ireland, declared in accordance with article 40 that the Convention shall extend to the Isle of Man.

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The Convention shall enter into force for the Isle of Man on June 15, 1980.

The declaration of extension contains the following reservation:

> ". . . in accordance with the provisions of Article 4 and Article 33 of the Convention the Isle of Man will not accept a Letter of Request in French."

In accordance with Article 35 of the Convention the following designations have been made:

a) under Articles 16, 17 and 18 of the Convention Her Majesty's First Deemster and Clerk of the Rolls is designated as the competent authority for the Isle of Man;

b) under Article 24 of the Convention, Her Majesty's First Deemster and Clerk of the Rolls is designated as an additional authority competent to receive Letters of Request for execution in the Isle of Man.

and the following declarations:

1. In accordance with Article 8, members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request in the Isle of Man.

2. In accordance with Article 18, a diplomatic officer, consular agent or commissioner authorized to take evidence under Article 15, 16 and 17 of the Convention may apply to the competent authority in the Isle of Man designated hereinbefore for appropriate assistance to obtain such evidence by compulsion provided that the Contracting State whose diplomatic officer, consular agent or commissioner makes the application has made a declaration affording reciprocal facilities under Article 18.

3. In accordance with Article 22, the Isle of Man will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents.

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The Government of the Isle of Man understands "Letter of Request issued for the purpose of obtaining pre-trial discovery of documents" for the purposes of the foregoing declaration as including any Letter of Request which requires a person:

a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

b) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or likely to be, in his possession, custody or power.

4. In accordance with Article 27, by the law and practice of the Isle of Man the prior permission referred to in Articles 16 and 17 of the Convention is not required in respect of diplomatic officers, consular agents or commissioners of a Contracting State which does not require permission to be obtained for the purposes of taking evidence under Articles 16 or 17.

Extension to Cayman Islands—

Notification in conformity with Article 42, sub d and e, of the Convention

By letter dated 16 September 1980 and received at the Ministry of Foreign Affairs of the Kingdom of the Netherlands on that same date, the Ambassador of the United Kingdom of Great Britan and Northern Ireland at The Hague referring to the deposit on 16 July 1976 of the instrument of ratification of the above-mentioned Convention by the United Kingdom of Great Britain and Northern Ireland declared in accordance with Article 40 that the Convention shall extend to the Cayman Islands.

The Convention will enter into force for the Cayman Islands on 15 November 1980.

The declaration of extension contains the following reservation:

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". . .in accordance with the provisions of Article 4 and Article 33 of the Convention. . . .the Cayman Islands will not accept a Letter of Request in French."

In accordance with Article 35 of the Convention the following designations have been made:

a) Under Articles 16 and 17 of the Convention, the Attorney General is designated as the competent authority for the Cayman Islands;

b) Under Article 18 of the Convention, the Clerk of the Grand Court is designated as the competent authority;

c) Under Article 24 of the Convention, His Excellency the Governor is designated as an additional authority competent to receive Letters of Request for execution in the Cayman Islands. and the following declarations:

1. In accordance with Article 8, members of the judicial personnel of the requesting authority may be present at the execution of a Letter of Request in the Cayman Islands.

2. In accordance with Article 18, a diplomatic officer, consular agent or commissioner authorized to take evidence under Article 15, 16 and 17 of the Convention may apply to the competent authority in the Cayman Islands designated hereinbefore for appropriate assistance to obtain such evidence by compulsion provided that the Contracting State whose diplomatic officer, consular agent or commissioner makes the application, has made a declaration affording reciprocal facilities under Article 18.

3. In accordance with Article 23, the Cayman Islands will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents. The Government of the Cayman Islands understand "Letters of Request issued for the purpose of obtaining pre-trial discovery of documents" for the purposes of the foregoing declaration as including any Letter of Request which requires a person:

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a) to state what documents relevant to the proceedings to which the Letter of Request relates are, or have been, in his possession, custody or power; or

b) to produce any documents other than particular documents specified in the Letter of Request as being documents appearing to the requested court to be, or likely to be, in his possession, custody or power.

4. In accordance with Article 27, by the law and practice of the Cayman Islands the prior permission referred to in Article 16 and 17 of the Convention is not required in respect of diplomatic officers, consular agents or commissioners of a Contracting State which does not require permission to be obtained for the purposes of taking evidence under Articles 16 or 17.

4-With the following designations and declarations:

The United States Department of Justice, Washington, D.C. 20530, is designated as the Central Authority referred to in Article 2 of the Convention.

Under paragraph 2 of Article 4 of the United States has agreed to accept a Letter of Request in or translated into French. The United States wishes to point out that owing to the necessity of translating such documents into English it will take the Central Authority longer to comply with a Letter of Request in or translated into French than with a similar request received in English.

In accordance with paragraph 3 of Article 4 the United States declares that it will also accept Letters of Request in Spanish for execution in the Commonwealth of Puerto Rico.

In accordance with Article 8 the United States declares that subject to prior authorization members of the judicial personnel of the requesting authority of another Contracting State may be present at the execution of a Letter of Request. The Department of Justice is the competent authority for the purpose of this Article.

Full Text of Convention on Taking Evidence Abroad in Civil or Commercial Matters

The United States declares that evidence may be taken in the United States under Article 16 and 17 without its prior permission.

In accordance with Article 18 the United States declares that a diplomatic or consular officer or a commissioner authorized to take evidence under Articles 15, 16 or 17 may apply for appropriate assistance to obtain the evidence by compulsion. The competent authority for the purposes of Article 18 is the United States district court of the district in which a person resides or is found. Such court may order him to give his testimony or statement or to produce a document or thing for use in a proceeding in a foreign tribunal. The order may direct that the testimony or statement be given, or the document or other thing be produced, before a person appointed by the court.

In accordance with Article 40 the United States declares that the Convention shall extend to Guam, Puerto Rico and the Virgin Islands.

MODEL FOR LETTERS OF REQUEST RECOMMENDED FOR USE IN APPLYING THE HAGUE CONVENTION OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE ABROAD IN CIVIL OR COMMERCIAL MATTERS

REQUEST FOR INTERNATIONAL JUDICIAL ASSISTANCE PURSUANT TO THE HAGUE CONVENTION OF 18 MARCH 1970 ON THE TAKING OF EVIDENCE IN CIVIL OR COMMERCIAL MATTERS

N.B. Under the first paragraph of article 4, the Letter of Request shall be in the language of the authority requested to execute it or be accompanied by a translation into that language.

Full Text of Convention on Taking Evidence Abroad in Civil or Commercial Matters

However, the provisions of the second and third paragraphs may permit use of other languages.

In order to avoid confusion, please spell out the name of the month in each date.

Full Text of Convention on Taking Evidence Abroad in Civil or Commercial Matters

I *(Items to be included in all Letters of Request.)*

1 Sender
*(identity and address)*_____

2 Central Authority of the Requested State
*(identity and address)*_____

3 Person to whom the executed request is to be returned
*(identity and address)*_____

II *(Items to be included in all Letters of Request.)*

4 In conformity with article 3 of the Convention, the undersigned applicant has the honour to submit the following request:

5 a Requesting judicial authority (article 3, a)
*(identity and address)*_____

b To the competent authority of (article 3, a)
*(the requested State)*_____

6 Names and addresses of the parties and their representatives (article 3, b)

a Plaintiff_____

Full Text of Convention on Taking Evidence Abroad in Civil or Commercial Matters

b Defendant_____

_____

c Other parties_____

_____

7 Nature and purpose of the proceedings and summary of the facts (article 3, c)_____

_____

8 Evidence to be obtained or other judicial act to be performed (article 3, d)_____

_____

_____

III *(Items to be completed where applicable.)*

9 Identity and address of any person to be examined (article 3, e)_____

_____

10 Questions to be put to the persons to be examined or statement of the subject matter about which they are to be examined (article 3, f)

*(or see attached list)*_____

_____

11 Documents or other property to be inspected (article 3, g)
(specify whether it is to be produced, copied, valued, etc.)

_____

12 Any requirement that the evidence be given on oath or admiration and any special form to be used (article 3, h)

Full Text of Convention on Taking Evidence Abroad in Civil or Commercial Matters

(In the event that the evidence cannot be taken in the manner requested, specify whether it is to be taken in such manner as provided by local law for the formal taking of evidence.)

_____

13 Special methods or procedure to be followed (articles 3, i and 9)_____

_____

14 Request for notification of the time and place for the execution of the Request and identity and address of any person to be notified (article 7)_____

_____

15 Request for attendance of participation of judicial personnel of the requesting authority at the execution of the Letter of Request_____

_____

16 Specification of privilege or duty to refuse to give evidence under the law of the State of origin (article 11, b)

_____

_____

17 The fees and costs incurred which are reimbursable under the second paragraph of article 14 or under article 26 of the Convention will be borne by

*(identity and address)*_____

_____

_____

Full Text of Convention on Taking Evidence Abroad in Civil or Commercial Matters

IV *(Items to be included in all Letters of Request.)*

18 Date of request

---

19 Signature and seal of the requesting authority

NEW YORK CIVIL PROCEDURE LAW AND RULES SECTIONS 3130, 3131, 5601 AND 5602 RULES 3132, 3133 AND 3134

§3130. Use of interrogatories

After commencement of an action, any party may serve upon any other party written interrogatories. A party may not serve written interrogatories on another party and also demand a bill of particulars pursuant to section 3041 nor, in the case of an action to recover damages for an injury to property or a personal injury resulting from negligence or wrongful death, take a deposition pursuant to rule 3107 without leave of court.

Added L.1963, c. 422, §3, and amended L.1979, c. 197, §1.

Federal Rules of Civil Procedure

Interrogatories to parties, see Rule 33, 28 U.S.C.A.

§3131. Scope of interrogatories

Interrogatories may relate to any matters embraced in the disclosure requirement of section 3101 and the answers may be used to the same extent as the depositions of a party. Interrogatories may require copies of such papers, documents or photographs as are relevant to the answers required, unless opportunity for this examination and copying be afforded.

New York Civil Procedure Law and Rules: Sections 3130, 3131, 5601 and 5602; Rules 3132, 3133 and 3134

Added L. 1963, C. 422, §3; amended L.1975, c. 859, §1.

Federal Rules of Civil Procedure

Interrogatories to parties, see Rule 33, 28 U.S.C.A.

Rule 3132. Service of interrogatories

After commencement of an action, any party may serve upon any other party written interrogatories. If service is made by any plaintiff upon any defendant within twenty days after service upon him of the summons and complaint, or service is made by any defendant upon the plaintiff within five days after service upon him of the summons and complaint, leave of court granted with or without notice must be obtained. A copy of the interrogatories and of any order made under this rule shall be served on each party. Added. L.1963, c. 422, §3.

Federal Rules of Civil Procedure

Interrogatories to parties, see Rule 33, 28 U.S.C.A.

Rule 3133. Objections to interrogatories

(a) When objection may be made. Within ten days after service of interrogatories, the party upon whom they are served may move upon notice to strike out any interrogatory, stating the grounds for objection.

(b) Suspension pending ruling. The answer to any interrogatory to which objection is made shall be deferred until the objections are ruled on by the court. Added L.1963, c. 422, §3.

Rule 3134. Answers to interrogatories

(a) How answers to be made. Interrogatories shall be answered in writing under oath by the party upon whom served, if an individual, or, if the party served is a corporation, a partnership, or a sole proprietorship, by any officer, director, agent or employee having the information. Each question shall be answered separately and fully and each answer shall be preceded by the question to which it responds.

(b) Service of answers. Within fifteen days after service of the interrogatories, the party upon whom they are served shall serve a copy of his answer upon each of the parties, except that any interrogatory objected to and not stricken shall be answered within five days after service of a copy of an order determining the motion to strike the interrogatory or within such time as the court shall direct.

(c) Amended answers. Amendments to answers to interrogatories may be made only by order of the court upon motion. Added L.1963, c. 422, §3; amended L.1964, c. 388, §§17, 18.

New York Civil Procedure Law and Rules: Sections 3130, 3131, 5601 and 5602; Rules 3132, 3133 and 3134

Federal Rules of Civil Procedure

Interrogatories to parties, see Rule 33, 28 U.S.C.A.

§5601. Appeals to the court of appeals as of right

(a) Dissent, reversal or modification. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where (i) there is a dissent on a question of law in favor of the party taking such appeal, or (ii) such order directs a reversal of the judgment or order appealed from, or (iii) such order directs a modification thereof in a substantial respect, which is within the power of the court of appeals to review on such appeal, and the party taking the appeal is aggrieved by the modification.

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and

2. from a judgment of a court of record of original instance which finally determines an

action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

(c) From order granting new trial or hearing, upon stipulation for judgment absolute. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

(d) Based upon non-final determination of appellate division. An appeal may be taken to the court of appeals as of right from a final judgment entered in a court of original instance or from a final determination of an administrative agency, or from an order of the appellate division which finally determines an appeal from such a judgment or determination, where the appellate division has made an order on a prior appeal in the action which necessarily affects the judgment or determination and which satisfies the requirements of subdivision (a) or of paragraph one of subdivision (b) except that of finality. As amended L.1963, c. 532, §39; L.1967, c. 342, §§1, 2; L.1969, c. 999; L.1973, c. 95, §2.

New York Civil Procedure Law and Rules: Sections 3130, 3131, 5601 and 5602; Rules 3132, 3133 and 3134

§5602. Appeals to the court of appeals by permission.

(a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application:

1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency.

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right, or

(ii) from a final judgment of such court or final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601; and

2. in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal, from an order of the appellate division

which does not finally determine such proceeding, except that the appellate division shall not grant permission to appeal from an order granting or affirming the granting of a new trial or hearing.

(b) Permission of appellate division. An appeal may be taken to the court of appeals by permission of the appellate division:

1. from an order of the appellate division which does not finally determine an action, except an order described in paragraph two of subdivision (a) or subparagraph (iii) of paragraph two of subdivision (b) of this section or in subdivision (c) of section 5601;

2. in an action originating in a court other than the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action, and which is not appealable as of right pursuant to paragraph one of subdivision (b) of section 5601, or

(ii) from a final judgment of such court or a final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final

judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601, or

(iii) from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

As amended L. 1967, c. 342,§§3, 4.

FRENCH PENAL CODE LAW NO. 80-538 OF JULY 15, 1980 AS TRANSLATED IN PARKER SCHOOL STUDIES IN FOREIGN AND COMPARATIVE LAW, COLUMBIA UNIVERSITY, *FRENCH LAW: CONSTITUTION AND SELECTIVE LEGISLATION* 8-49 to 50 (1981)

PENAL CODE

LAW NO. 80-538 OF JULY 16, 1980,

Concerning the Communication of Documents and Information or an Economic, Commercial or Technical Nature to Foreign Natural or Legal Persons

(J.O. July 18, 1980)

Art. 1. The title of Law No. 68-678 of July 26, 1968 concerning the communication of documents and information to foreign authorities engaged in maritime commerce is modified as follows:

> "Law concerning the communication of documents and information of an economic, commercial, industrial, financial or technical nature to foreign natural or legal persons."

Art. 2.—1.—Article 1 of the abovementioned Law No. 68-678 of July 26, 1968 is written as follows:

> "Art. 1. Subject to treaties or international agreements, every natural person of French nationality or residing habitually in French territory, and every manager (*dirigeant*), representative, officer (*agent*) or agent (*prepose*) of a legal person having its seat or an establishment

there, is forbidden to communicate in writing, orally or in any other manner, at any place, documents or information of an economic, commercial, industrial, financial or technical nature whose communication is capable of injuring the sovereignty, the security, the essential economic interests of France, or the public order, as specified by the administrative authority to the extent necessary."

II.—There is inserted, after article 1 of the abovementioned Law No. 68-678 of July 26, 1968, an article 1 *bis* written as follows:

"Art. 1 *bis*. Subject to treaties or international agreements and to the laws and regulations in force, every person is forbidden to request, to seek or to communicate, in writing, orally or in any other manner, documents or information of an economic, commercial, industrial, financial or technical nature intended to serve as evidence in foreign judicial or administrative proceedings or within the scope of the latter."

Art. 3. Article 2 of the abovementioned Law No. 68-678 of July 26, 1968 is modified as follows:

"Art. 2. The persons mentioned in articles 1 and 1 *bis* are required to inform the competent minister immediately when they are in receipt of any request concerning such communications."

Art. 4. Article 3 of the abovementioned Law No. 68-678 of July 26, 1968 is modified as follows:

French Penal Code Law No. 80-538 of July 15, 1980

"Art. 3. Without prejudice to the more severe penalties prescribed by law, every infraction of the provisions of articles 1 and 1 *bis* of the present law is punishable by imprisonment of from two to six months and a fine of from 10,000 F to 120,000 F or by only one of these two penalties."

FRENCH PENAL CODE LAW NO. 80-538 OF JULY 16, 1980, APPENDICE ON CODE DE COMMERCE, PETIS CODES DALLOZ (SOLIZANTE — SEIZIEME ED.) 1980-81 (ORIGINAL FRENCH VERSION)

9° Communication de renseignements a des personnes etrangeres.

Loi n• 68-678 du 26 juillet 1968,

Relative a la communication de documents ei renseignements d'ordre economique, commercial, industriel, financier ou technique a des personnes physiques ou morales etrangeres (L. n• 80-538 du 16 juill. 1980).

Art. 1⁴. (L. n• 80-538 du 16 juill. 1980) Sous reserve des traites ou accords internationaux, il est interdit a toute personne physique de nationalite irancaise ou residant habituellement sur le territoire irancais et a tout dirigeant, representant, agent ou prepose d'une personne morale y ayant son siege ou un elablissement de communiquer par ecrit, oralement ou sous toute autre forme, en queique lieu que ce soit, a des autoriles publiques etrangeres. les documents ou les renseignements d'ordre economique, commercial, industriel, unancier ou technique dont la communication est de nature a porter atteinte a la souverainete, a la securite, aux interets

economiques essentiels de la France ou a l'ordre public, precises par l'autorite administrative en tant que de besoin.

1⁴ bis. (L. n• 80-538 du 16 juill. 1980) Sous reserve des traites ou accords internationaux et des lois et regiements en vigueur, il est interdit a toule personne de demander, de rechercher ou de communiquer, par ecrit, oralement ou sous toute autre forme,

des documents ou renseignements d'ordre economique, commercial, industriel, financier ou technique tendant a la constitution de preuves en vue de procedures judiciaires ou administratives etrangeres ou dans le cadre de celles-ci.

2. (L. n• 80-538 du 16 juill. 1980) Les personnes visces aux articles 1[a] et 1[a] bis sont tenues d'informer sans delaile minusire competent lorsquielles se trouvent saisies de toute demande concernant de teiles communications.

3. (L. n• 80-538 du 16 juill. 1980) Sans prejudice des peines plus lourdes prevues par la joi, toute infraction aux dispositions des articles 1[a] et 1[a] bis de la presente loi sera punie d'un emprisonnement de deux mois a six mous et d'une amende de 10 000 F a 120 000 F ou de l'une de ces deux peines seulement.

LETTER OF THE FRENCH MINISTRY OF JUSTICE TO JAMES G. HERGEN, ESQ. OF THE OFFICE OF FOREIGN LITIGATION, UNITED STATES DEPARTMENT OF JUSTICE, DATED MARCH 9, 1981

DEPARTMENT OF STATE
Division of Language Services

(Translation)

LS NO. 102319
RHO/MM
French

Ministry of Justice
13, Place Vendome

The Director of Civil Affairs and the Seal

Paris, March 9, 1981

Mr. James G. Hergen
Attorney, Office of Foreign Litigation
Civil Division
Department of Justice
Washington, D.C., U.S.A.

Sir:

You have requested my department's opinion on the scope and significance of the Law of July 16, 1980, amending the Law of July 26, 1968, concerning the disclosure of documents and information of an economic, commercial, industrial, financial, or technical nature to foreign natural or juristic persons. You have requested specific information regarding any effects this law

Letter of the French Ministry of Justice to James B. Hergen, Esq. Dated March 9, 1981

may have on the implementation of The Hague Convention of 1970 on the taking of evidence abroad in civil or commercial matters, to which France and the United States are parties, as well as persons liable to incur the penalties stipulated by the law following violation of the provisions of its Article 1 bis.

I have the honor to inform you that Article 1 bis of the Law of July 16, 1980, amending the Law of July 26, 1968, is intended to ensure the enforcement in French territory of the regulations on the taking of evidence abroad as they are established in civil and commercial matters in France's relations with the United States by the provisions of The Hague Convention of March 18, 1970, together with the declaration and reservation made by the French government, taking the provisions of the French Code of Civil Procedure into consideration.

In accordance with the terms of these regulations, the only two methods of investigation in French territory that may be ordered by foreign legal authorities, subject to the condition established by these instruments, are letters of request [*] and taking of evidence by diplomatic officers, consular agents, and commissioners (Chapters I and II of The Hague Convention of March 18, 1970, and Articles 733 et seq of the new French Code of Civil Procedure).

Nothwithstanding the agreement between the parties, Article I bis of the Law of July 16, 1980 prevents recourse in French territory to any other methods of investigation or procedure for

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[* This term is used in the Hague Convention of March 18, 1970; the usual term is letters rogatory.]

Letter of the French Ministry of Justice to James B. Hergen, Esq.
Dated March 9, 1981

taking of evidence that is considered unlawful, particularly recourse to requests for direct disclosure of documents or information.

Moreover, Article 1 bis makes it possible to punish violations of the conditions established in The Hague Convention and in the declaration which the French government made at the time of ratification of this instrument for the execution of letters of request and the taking of evidence by commissioners. Notwithstanding the agreement between the parties, the law thereby makes it possible to prevent recourse to evidence taken by commissioners without prior authorization by my department.

It should be emphasized that the information communicated to you on the scope and significance of the Law of July 16, 1980, concerns only the relations of judicial cooperation between our two countries in civil and commercial matters. My department had an opportunity to clarify these different points in its reply to a question in writing from Mr. Chinaud, a deputy, of which a copy is enclosed.

I also have the honor to inform you that the penalties stipulated by the Law apply irrespective of the status, nationality, or domicile of the person concerned.

Therefore the Law of July 16, 1980, has given full effect to our relations of judicial cooperation by assuring improved implementation of the provisions of The Hague Convention of March 18, 1970 and by enabling American litigants to obtain evidence in France. by methods that are in conformity with the international commitments of our two countries, for use in judicial proceedings in the United States.

Letter of the French Ministry of Justice to James B. Hergen, Esq.
Dated March 9, 1981

If there is no objection, I would be grateful if you would inform the judicial authorities and legal practitioners of your country of this opinion.

Naturally, I would be willing to furnish any additional information. I am enclosing a copy of the legislative history of this law.

Very truly yours,

[Signature]
Renaud Deneix de Saint Marc

FIRST SET OF INTERROGATORIES TO CLUB MEDITERRANEE, S.A.

SUPREME COURT OF NEW YORK STATE
NEW YORK COUNTY

Index No. 4777/82

MARJORIE SCHLOSSBERG DORIN and
PHILIP A. DORIN

Plaintiffs,

-v-

CLUB MEDITERRANEE, S.A., et al,

Defendants

PLEASE TAKE NOTICE that plaintiffs, by their attorney, THOMAS A. DICKERSON, and pursuant to C.P.L.R. Article 31, submits the following Interrogatories to defendant Club Mediterranee, S.A., to be answered under oath and in writing within fifteen (15) days after service hereof.

INTERROGATORIES

Interrogatory #1

State the name, address, position and title of the person answering these interrogatories.

Interrogatory #2

Set forth whether or not Club Mediterranee, S.A. [hereinafter "Club Med"] is;

a. the owner of the Club Med facility in Haiti;
b. the lessor of the Club Med facility in Haiti
c. the lessee of the Club Med facility in Haiti
d. the manager of the Club Med facility in Haiti;
e. the builder of the Club Med facility in Haiti
f. the entity that maintains the Club Med facility in Haiti

Interrogatory *#3*

If the answer to any of the Interrogatories set forth in "#2" above is yes, then describe each and every document in your possession which describes said relationship; the description of documents should include the title, the date, the number of pages, to whom addressed, name of the sender and the document's present location.

Interrogatory #4

State when construction began on the Club Med facility in Haiti and when it was completed. Identify all entities who were involved in the construction of the Club Med facility in Haiti to include their name, address, present location and a detailed description of duties during the construction period.

Interrogatory *#5*

Regarding the construction of the Club Med facility in Haiti describe all plans utilized to include the name of the plan, the number of pages and the present location of these documents.

Interrogatory #6

State whether or not Club Med has an operational manual which relates to the construction of facilities and, particularly,

the Club Med facility in Haiti. If the answer is yes then describe this manual to include its name, the number of pages and its present location.

Interrogatory #7

State whether or not Club Med has an operational manual which relates to the operation of facilities and, particularly, the Club Med facility in Haiti. If the answer is yes then describe this manual to include its name, the number of pages and its present location.

Interrogatory #8

State the name and address of all persons accommodated at the Club Med facility in Haiti during the period when the plaintiffs stayed there.

Interrogatory #9

State the time period during which the Club Med facility in Haiti has been open to the reception of guests. Regarding this period state each and every occurrence of gastro-intestinal disorders reported by guests to your attending medical personnel and/or reflected in complaint letters received by you or your agents, joint ventures and representatives. Regarding said reported occurrences and complaints set forth the name and address of each guest reporting and/or complaining of such disorders to include reports of the contraction of any disease including typhoid fever, malaria and salmonella infections.

First Set of Interrogatories to Club Mediterranee, S.A.

Interrogatory #10

State whether or not you recommend and/or require your employees at the Club Med facility in Haiti to take appropriate shots and/or medicines to combat typhoid fever and malaria.

Interrogatory #11

State whether or not inspections have been made of the Club Med facilities in Haiti regarding the sanitation systems, the food storage and preparation facilities, the water systems and of those personnel responsible for maintaining and operating same. If the answer is yes, describe each and every inspection done during the period when the facility was open to the reception of guests and identify each and every written report generated therefrom to include the name of the report, its date, and the name of the sender and the name of the receiver and its present location.

Interrogatory #12

State the date when consideration was given to the possibility of constructing and operating a Club Med facility in Haiti. Regarding that date to present, state whether or not you ever possessed documents, reports and memorandum [created by you or by others] which described and/or discussed the incidence of diseases in Haiti to include malaria, typhoid fever and tuberculosis. If the answer is yes, then describe each and every such document, report and memorandum to include its name, the date, the name of the creator, the name of the sender and the name of the receiver and its present location.

Interrogatory #13

State the name, address, title and position of the following persons;

First Set of Interrogatories to Club Mediterranee, S.A.

a. the present manager of the Club Med facility in Haiti;

b. all managers of the Club Med facility in Haiti from the date the facility was open to the reception of guests to the present;

c. all medical personnel at the Club Med facility in Haiti from the date the facility was open to the receiption of guests to present;

d. that person responsible for overseeing and monitoring sanitation facilities, food storage and preparation and medical facilities at all Club Med facilities throughout the world.

Dated: September 14, 1982

YOURS ETC

THOMAS A. DICKERSON
545 Fifth Avenue
NY NY

T O : Kroll, Pomerantz & Cameron
500 Fifth Avenue
NY NY

D'Amato & Lynch
70 Pine Street
NY NY

McCormick, Dunne & Foley
71 Broadway
NY NY

Feder, Kaszovitz, Weber & Skala
450 Seventh Avenue
NY NY

APPELLANT'S MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

Index No.: 4777/82

MARJORIE SCHOLOSSBERG DORIN and PHILIP DORIN,

Plaintiffs-Respondents,

-against-

CLUB MEDITERRANEE, S.A.,

Defendant-Appellant,

-and-

CLUB MED, INC., CELEBRITY TRAVEL SERVICE, LTD., KENT TRAVEL SERVICE, INC., SOCIETE GENERALE and NATIONAL UNION FIRE INSURANCE,

S I R :

PLEASE TAKE NOTICE, that upon the affirmation of Robert Stein, Esq., and upon the order of the Hon. Justice Stanley Parness, entered and filed in the office of the Clerk of the County of New York on January 5, 1983, denying the motion, in part, of the moving defendant herein, CLUB MEDITERRANEE, S.A., for a protective order striking plaintiffs' interrogatories dated September 14, 1982, and upon the order of Appellate Division, First Department, entered in the office of the Clerk of the Appellate Division, First Department, on April 26, 1983, affirming

the order appealed from without opinion, and upon the record on appeal to this Court from the order entered in the office of the Clerk of the County of New York on January 5, 1983, and upon all prior proceedings had heretofore and additional exhibits annexed hereto, the undersigned will move this Court at a Term to be held at the Courthouse, located at 27 Madison Avenue and 25th Street, New York, New York on June 9, 1983 at 10:00 in the forenoon of that day or as soon thereafter as counsel can be heard for an order pursuant to CPLR §5602 (b)(1), granting leave to defendant CLUB MEDITERRANEE, S.A. to appeal to the Court of Appeals from the order of the Appellate Division, on the grounds that the aforesaid orders were erroneous as a matter of law and directly contravene superseding federal and international law and treaty; and for the certificate of the Appellate Division certifying that the following questions of law were decisive in its determination and present issues which merit review by the Court of Appeals:

1. Are the provisions of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, (hereafter, Hague Evidence Convention), 28 U.S.C. §1781, applicable to pre-trial discovery proceedings in a New York State Supreme Court action involving a French corporation as a party defendant?

2. Do the provisions of the Hague Evidence Convention, which has been formally adopted and enacted by the governments of the United States and France, supersede conflicting New York State procedural law in the administration of a civil case in this state?

3. Are the courts of this State barred, pursuant to the mandates of international law and comity, from compelling a French domiciliary to violate the penal laws of France by disclosing

information through pre-trial discovery procedures which contravene the requirements of the Hague Evidence Convention?

And for such other and further relief as to this Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE, that pursuant to stipulation, answering papers, if any, must be served upon the undersigned on or before June 1, 1983.

Dated: May 20, 1983
New York, New York

Yours, etc.,

KROLL, POMERANTZ & CAMERON
Attorneys for Defendant-Appellant
500 Fifth Avenue
New York, New York 10110
(212) 921-9080

TO: Thomas Dickerson, Esq.
Attorney for Plaintiffs-Respondents

Appellant's Motion for Leave tc Appeal

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

Index No.: 4777/82

MARJORIE SCHLOSBERG DORIN and PHILIP DORIN,

Plaintiffs-Respondents,

-against-

CLUB MEDITERRANEE, S.A.,

Defendant-Appellant,

-and-

CLUB MED, INC., CELEBRITY TRAVEL SERVICE, LTD., KENT TRAVEL SERVICE, INC., SOCIETE GENERALE and NATIONAL UNION FIRE INSURANCE,

AFFIRMATION

ROBERT STEIN, an attorney duly admitted to practice law before the courts of this State, aware of the penalties for perjury affirms as follows:

Your affirmant is associated with the law firm of Kroll, Pomerantz and Cameron, attorneys for the defendant/appellant, CLUB MEDITERRANEE, S.A.

INTRODUCTION

Your affirmant submits this affirmation in support of the instant motion pursuant to CPLR §5602 (b)(1) granting leave to

the aforesaid defendant/appellant to appeal the order of this Honorable Court dated April 26, 1983 and to certify the following questions of law as decisive in its determination herein:

1. Are the provisions of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, (hereinafter, Hague Evidence Convention), 28 U.S.C. §1781, applicable to pre-trial discovery proceedings in a New York State Supreme Court action involving a French corporation as a party defendant?

2. Do the provisions of the Hague Evidence Convention, which has been formally adopted and enacted by the governments of the United States and France, supersede conflicting New York State procedural law in the administration of a civil case in this state?

3. Are the courts of this State barred, pursuant to the mandates of international law and comity, from compelling a French domiciliary to violate the penal laws of France disclosing information through pre-trial discovery procedures which contravene the requirements of the Hague Evidence Convention?

It is respectfully submitted to the Court for the reasons outlined below and in the previously submitted appellate briefs herein that the answers to the aforesaid questions should be in the affirmative.

PROCEDURAL HISTORY OF THIS ISSUE

This motion and the appellate order from which it is taken spring from a motion for a protective order by the appellant to strike the interrogatories propounded by the plaintiff to the French defendant, CLUB MEDITERRANEE, S.A., on the grounds that

they were procedurally defective and in clear contravention to binding U.S. and international law and treaty as well as French penal law.

By order of the Hon. Stanley Parness, dated and entered in the office of the Clerk of New York County on January 5, 1983, the aforesaid motion was denied in substantial part and the appellant's contention that pre-trial discovery proceedings against a French national sued herein are regulated by the provisions of the Hague Evidence Convention was deemd, ". . .without merit."

An appeal was taken from that order to this Court. The order has been affirmed without opinion as reflected in the order of this Court entered on April 26, 1983 in the office of the Clerk of the Appellate Division, First Department. Said order is annexed hereto as Exhibit "A" and made a part hereof.

ARGUMENT

The Convention on the Taking of Evidence Abroad in Civil or Commercial Matters was ratified by the United States Senate and proclaimed by the President on September 15, 1972. Then Secretary of State Rogers in his letter of submittal to the President of November 9, 1971, recommending the adoption of the Convention, stated:

> . . .the provisions of the Convention are in conformity with the improved procedures for international judicial assistance adopted by the Congress in Public Law 88-619 and embodied in Section 1782 of Title 28, United States Code.[1]

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1. Message from the President of the United States, 92 Cong. 2d Sess. (1972) at (v).

He further noted that the United States had proposed the revisions relating to the taking of evidence in foreign countries.[2] The need for such revisions arose from ". . .[t]he substantial increase in litigation with foreign aspects arising, in part, from the unparalleled expansion of international trade and travel in recent decades [which] had intensified the need for an effective international agreement to set up a model system to bridge differences between the common law and civil law approaches to the taking of evidence abroad."'[3] Finally, he concluded by stating:

> The Convention is a major contribution to the elimination of formal and technical obstacles to securing evidence abroad.[4]

The President, in his transmittal letter to the Senate further stated:

> This Convention is a significant step forward in the field of international judicial cooperation. It will premit our courts and litigants to avail themselves of a number of improved and simplified procedures for the taking of evidence.[5]

The President also advised the Senate that ratification of the Convention was supported by, *inter alia*, the American Bar Association, the Judicial Conference of the United States, and

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2.. *id* at v.

3. *id* at vi.

4. *id* at x.

5. *id* at III.

the National Conference of Commissions on Uniform State Laws. Thus, it can be readily seen that the Convention was adopted with not only the enthusiastic support of the executive and legislative branches of the United States Government, but also that of the highest governing bodies of the "bench" and the "bar."

There can be no dispute that treaties to which the United States is a party are part of the supreme law of the land. They must be adhered to in good faith. *See* U.S. Const. Art. VI, Cl. 2; *United States v. Pink*, 315 U.S. 203, 232-34 (1942); *United States v. Belmont*, 301 U.S. 324, 330-31 (1937); *Torres* (7th Cir. 1979) ("Under Article VI, Clause 2 of the United States Constitution treaties are part of the Supreme Law of the Land."); *Continental Dredging Co. v. County of Los Angeles*, 366 F. Supp. 1133, 1136 (C.D. Cal. 1973) ("The provisions of treaties with foreign states must be meticulously adhered to."); RESTATEMENT OF LAW, FOREIGN RELATIONS LAW (REVISED), T.D. No. 1§324 (1980) ("Every international agreement in force is binding upon the parties to it and must be performed by them in good faith.")

The Hague Evidence Convention requires that a specific procedure be followed when evidence is sought from the foreign domiciliary of a signatory nation in pre-trial proceedings such as in the case at bar. A discussion of those procedures can be found in the brief on appeal but it is uncontroverted that no effort was made to comply with any of the requirements of this law.

It appears self-evident that judicial sanction of the plaintiff's non-compliance will effectively abrogate the express terms of a binding international treaty. Such a result would clearly have adverse repercussions both here and abroad in the administration of international litigation.

Appellant's Motion for Leave to Appeal

The very issues presently before this court have been the subject of litigation in other states. As will be discussed below, the relevant questions of law have been presented to the U.S. Supreme Court in the case of *Volkswagenwerk, A.G. v. Falzone*, No. A-875 (4/29/83), in the form of application for stays pending appeal, and will, upon information and belief, come before the Court for resolution on the merits in the near future.

Additionally the issues presented herein have recently come before the United States District Court for the Eastern District of Pennsylvania in the case of *Rockwell International Corporation v. Costruzioni Aeronautiche Giovanni Agusta, S.P.A. and S.N.F.A.*, (Civil Action No. 81-3984). As evidenced by the affidavit of Barrie Snider, Esq., as well as the Order of the Hon. James Giles, annexed hereto as Exhibit "B", the aforesaid U.S. District Court decided the same issue by ordering compliance with the terms and provisions of the Hague Evidence Convention, i.e., letters rogatory.

It is respectfully submtited that the Court herein erred in upholding a judicial determination which contravenes the express mandates of superceding U.S. statutory and constitutional law.

As also noted in the appellant's brief, compliance with the order of the Justice Parness would constitute a violation of French penal law and subject CLUB MEDITERRANEE, S.A., its officers, directors and employees, to the imposition of criminal sanctions. Documentary evidence annexed in the record below have indicated the intention of the French government to strictly enforce the terms of this treaty in the case of violations by French nationals. It is respectfully submitted that the courts of this nation have historically recognized that the principle of international law and comity prohibit the indiscriminate applications of U.S. law

which is inconsistent with the internal laws of another sovereign state. See *Volkswagenwerk, A.G. v. Superior Court*, 123 Cal. App. 34d 840, 176 Cal. Rptr. 874 (1981). As noted in the appellant's brief before the Court, the judicial order in question contravenes not only French law, but superseding U.S. law as well.

BASIS OF APPLICATION FOR LEAVE TO APPEAL

It is respectfully submitted that a determination of the above issues for which certification is sought was decisive in this Court's disposition of the appeal in question and that said issues involve substantial questions of federal statutory and constitutional law as well as international law and treaty. The ultimate resolution of these issues will have a great and far reaching impact upon the voluminous amount of litigation in this State involving foreign and multi-national corporations. It involves as well clear issues of United States constitutional law and the interpretation of binding treaty commitments enacted and adopted by the government of the United States. The questions presented in this case are not subject to precedent in New York State and it is only through review and decision by the Court of Appeals that a uniform standard for the application of the treaty and statute in question may be adopted in this State.

The very issues presented herein have been reviewed twice by the U.S. Supreme Court in the case of *Volkswagenwerk A.G. v. Falzone, et al., supra.* The motions before the Court were in the form of applications for emergency stays pending a disposition on the merits of the very issues now pending in the case at bar. The Supreme Court granted the appellants applications in both instances. A copy of the order of Justice O'Connor is annexed hereto as Exhibit "C" and made a part hereof. The Court's attention is directed to her reference to Chief Justice Burger's prior order and her discussion thereto.

Appellant's Motion for Leave to Appeal

> "In granting the stay pending the disposition of the appeal to the Michigan Supreme Court, *the CHIEF JUSTICE must have concluded that there was a substantial chance that four Justices would agree to consider the case on the merits, that there was a significant chance that the applicant would prevail,* and that the injury resulting from the denial of a stay would be irreparable. See generally *Graves v. Barnes*, 405 U.S. 1201, 1203-1204 (1972) (POWELL, J., in Chambers)." (emphasis added).

It is also noted that the Michigan Supreme Court has denied the application for leave to appeal and therefore the final, adverse decision will now be presented to the U.S. Supreme Court on the merits for ultimate resolution in the near future. Upon information and belief, a direct appeal to the U.S. Supreme Court on the issues raised by the application of the Hague Evidence Convention, is being filed by the attorneys for the appellants therein, and, pursuant to Justice O'Connor's order, there is at least a significant chance that the above appellant's will prevail.

In conclusion, the issues upon which the request for certification to the Court of Appeals is based, present questions of law which are clearly of such significance and import so to merit review by the Court of Appeals or a stay pending review by the U.S. Supreme Court of the aforesaid case of *Volkswagenwerk A.G. v. Falzone, supra.*

WHEREFORE, it is respectfully requested that the appellant, CLUB MEDITERRANEE, S.A., be granted leave to appeal to the Court of Appeals upon the questions to be certified by this Court, as noted above, or in the alternative for a stay pending a disposition of the issues herein by the United States Supreme Court in the case of *Volkswagenwerk, A.G. v. Falzone, supra,*

and for whatever other and further relief this Court deems just and proper.

Dated: May 20, 1983
New York, New York

s/ Robert Stein
ROBERT STEIN

Appellant's Motion for Leave to Appeal

EXHIBIT A

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on April 26, 1983

Present—Hon. Joseph P. Sullivan, Justice Presiding
David Ross
Arnold L. Fein
E. Leo Milonas
Bentley Kassal, Justices.

MARJORIE SCHLOSSBERG DORIN and PHILIP DORIN,
Plaintiffs-Respondents,

-against-

CLUB MEDITERRANEE, S.A.,
Defendant-Appellant,

-and-

CLUB MED, INC., CELEBRITY TRAVEL SERVICE, LTD., KENT TRAVEL SERVICE, INC., SOCIETE GENERALE and NATIONAL UNION FIRE INSURANCE,
Defendants.

16526N

An appeal having been taken to this Court by the above-named appellant from an order of the Supreme Court, New York County (Parness, J.), entered on January 5, 1983, which granted

defendant-appellant's motion for a protective order striking plaintiffs' interrogatories only to the extent of striking interrogatories 8, 9, 12 and 13(d),

And said appeal having been argued by Robert Stein of counsel for appellant, and by Thomas A. Dickerson of counsel for respondents; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed. Respondents shall recover of appellant $50 costs and disbursements of this appeal.

ENTER:

JOSEPH J. LUCCHI
Clerk.

Appellant's Motion for Leave to Appeal

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

Index No. 4777/82

MAJORIE SCHLOSSBERG DORIN and PHILIP DORIN,

Plaintiffs-Respondents

-against-

CLUB MEDITERRANEE, S.A.,

Defendant-Appellant,

-and-

CLUB MED, INC., CELEBRITY TRAVEL SERVICE LTD., KENT TRAVEL SERVICE, INC., SOCIETE GENERALE and NATIONAL UNION FIRE INSURANCE,

Defendants.

STATE OF NEW YORK)
:ss.:
COUNTY OF NEW YORK)

BARIE W. SNIDER, being duly sworn deposes and says:

I am associated with the law firm of Kroll, Pomerantz & Cameron, attorneys for the movant(s), herein CLUB

MEDITERRANEE' S.A. This affidavit is submitted in support of motion for certification of question to the Court of Appeals.

On May 17, 1983, I attended a hearing before Judge James T. Giles, Judge of the United States District Court for the Eastern District of Pennsylvania in an action entitled *Rockwell International Corporation v. Costruzioni Aeronautiche Giovanni Agusta, S.p.A. and S.N.F.A.*, Civil Action No. 81-3984. That hearing was conducted in order to hear oral argument on a motion made on behalf of defendant S.N.F.A. for reconsideration of Judge Giles prior order ordering S.N.F.A. to provide discovery requested by plaintiff Rockwell International Corporation pursuing to the Federal Rules of Civil Procedure.

S.N.F.A. is a domiciliary of the Republic of France, and the prior order of Judge Giles was in violation of the terms and procedures established by the Hague Convention on the taking of evidence abroad in Civil and Commercial Matters.

Following oral argument, Judge Giles of the United States District Court of the Eastern District of Pennsylvania determined that the above Convention is a treaty of the United States, binding upon his court and all courts in the United States. Consequently, Judge Giles rescinded his prior order compeling S.N.F.A. to provide discovery, and order the plaintiff Rockwell Corporation to seek discovery in accordance with the terms and procedures established by the Convention.

Dated: New York, New York
May 20, 1983

s/ Barie W. Snider
BARIE W. SNIDER

Sworn to before me
this 20th day of May, 1983

s/ Robert Stein
ROBERT STEIN
Notary Public, State of New York
No. 31-4043793
Qualified in New York County
Commission Expires March 30, 1985

Appellant's Motion for Leave to Appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ROCKWELL INTERNATIONAL CORPORATION

v.

COSTRUZIONI AERONAUTICHE GIOVANNI AGUSTA, S.P.A. and SNFA

CIVIL ACTION

NO. 81-3984

FILED MAY 20, 1983

ORDER

AND NOW, this 20th day of May, 1983, for the reasons stated in the Bench Decision rendered May 17, 1983, it is hereby ORDERED that:

1. SNFA's Motion for Reconsideration is GRANTED. This court's order dated March 18, 1983 is VACATED.

2. Rockwell shall proceed with discovery of SNFA by letters rogatory, complying with all requirements of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters.

3. Rockwell's Motion to Stay SNFA's Discovery is GRANTED, pending Rockwell's receipt of the answers to interrogatories and production of the documents requested of SNFA.

Appellant's Motion for Leave to Appeal

4. Agusta's Motion for a Protective Order is DENIED, but its Motion for Extention of the Discovery Deadline is GRANTED. The scheduling order of March 24, 1983 is VACATED. A new schedule will be established upon receipt by this court of responses to the letters rogatory.

BY THE COURT:

s/ James T. Giles

ENTERED: 5/23/83
CLERK OF THE COURT

Appellant's Motion for Leave to Appeal

SUPREME COURT OF THE UNITED STATES

No. A-875

VOLKSWAGENWERK A.G. *v.* JOSEPH and BARBARA FALZON, etc.

ON APPLICATION FOR STAY

[April 29, 1983]

JUSTICE O'CONNOR, Circuit Justice.

Under Rule 44.4, the Justices of this Court will not entertain an application for a stay unless the applicant has first sought relief from the appropriate lower court or courts, except "in the most extraordinary circumstances." I conclude that this case presents most extraordinary circumstances and will therefore entertain the application and grant a stay.

The applicant is a German corporation that is defending an action in the Michigan state courts. The plaintiffs in that action seek to depose a number of employees of the applicant, all of whom reside in the Federal Republic of Germany. Attempting to prevent the depositions in the trial court, the applicant argued that the method the plaintiffs sought to employ violated the Convention on Taking of Evidence Abroad in Civil or Commercial Matters, 28 U.S.C. §1781, a treaty to which the United States and the Federal Republic of Germany are parties. See Department of State, Treaties in Force 249 (1983). The trial court denied the motion, and the Michigan Court of Appeals denied leave to appeal. The applicant then sought review in the Michigan Supreme Court. Meanwhile, the trial court ordered that the depositions take place on or before August 30, 1982, and the plaintiffs filed notice to

take the depositions on August 23, 1982. The applicant then applied to the Michigan Supreme Court for an emergency stay of the order and for immediate consideration of the order. When the state supreme court did not act, the applicant sought a stay from this Court, and on August 23, 1982, THE CHIEF JUSTICE granted a stay pending final disposition of the appeals before the Michigan Supreme Court. *Volkswagenwerk A.G. v. Falzon,* A-191, O.T. 1981 (order of August 23, 1982). He later denied a motion to vacate the stay. *Volkswagenwerk A.G. v. Falzon,* A-191, O.T. 1981 (order of September 2, 1982).

On February 22, 1983, the Michigan Supreme Court denied the applicant's application for leave to appeal. At that point, the stay entered by THE CHIEF JUSTICE expired by its own terms. The plaintiffs then filed notice of taking depositions, scheduling the depositions for May 2, 1983. On April 4, 1983, the applicant sought a stay of the depositions from the Michigan Supreme Court, pending disposition of its appeal to this Court of the earlier judgment of the Michigan Supreme Court. The state supreme court has not acted, so the applicant now seeks a stay from this Court pending disposition of the appeal here.

In granting the stay pending the disposition of the appeal to the Michigan Supreme Court, THE CHIEF JUSTICE must have concluded that there was a substantial chance that four Justices would agree to consider the case on the merits, that there was a significant chance that the applicant would prevail, and that the injury resulting from the denial of a stay would be irreparable. See generally *Graves v. Barnes,* 405 U.S. 1201, 1203-1204 (1972) (POWELL, J., in Chambers). Since the question on the merits is unchanged, it is essentially the "law of the case" that a stay would be appropriate, unless, of course, the response presents new information. Cf. *Shlesinger v. Holtzman,* 414 U.S. 1321, 1324-1325, and nn. 3, 4 (1973) (Douglas, J., dissenting) (single Justice not empowered to vacate stay granted by another

Justice); R. Stern and E. Gressman, Supreme Court Practice 866-867 (5th ed. 1978) (same). Consequently, the failure of the Michigan Supreme Court to act promptly should not prevent a member of this Court from entertaining an application to stay the order pending final disposition of the appeal in this Court. Proper deference to the Michigan Supreme Court, however, requires that the court have an opportunity to dispose of the stay application before it. Accordingly, I grant the stay pending disposition of the application for a stay in the Michigan Supreme Court.

Appellant's Motion for Leave to Appeal

STATE OF NEW YORK)
:ss.:
COUNTY OF NEW YORK)

JOAN WELSH, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides in Queens, New York.

That on the 25th day of May, 1983, deponent served the within Notice of Motion for Leave to Appeal upon:

Thomas Dickerson, Esq.
545 Fifth Avenue
New York, New York 10017

in this action at the address designated by said attorney for that purpose by depositing same enclosed in a post paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.

s/
JOAN WELSH

Sworn to before me this
25th day of May, 1983.
s/
GLADYS BART-WILLIAMS
Notary Public, State of New York
No. 03-4749100
Qualified in Bronx County
Commission Expires March 30, 1984

FILED
SEP 21 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-461

In the Supreme Court of the United States

OCTOBER TERM, 1984

CLUB MEDITERRANEE, S.A., APPELLANT
v.
MARJORIE SCHLOSSBERG DORIN AND
PHILIP DORIN

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether a state court in a private civil action violates the Supremacy Clause by ordering a party to answer interrogatories pursuant to state law, rather than utilizing the procedures authorized by the Hague Evidence Convention, where the party asserts that the information necessary to answer the interrogatories is available only in the territory of a foreign state that is a party to the Convention.

2. Where compliance with such interrogatories would assertedly require a party to the action to violate the laws of the foreign state, while the information sought might be provided by the party without violating the foreign state's laws if obtained through procedures authorized by the Evidence Convention, whether a state court is required as a matter of international comity to attempt in the first instance to obtain the information through the procedures authorized by the Convention.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-461

CLUB MEDITERRANEE, S.A., APPELLANT

v.

MARJORIE SCHLOSSBERG DORIN AND
PHILIP DORIN

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

In this personal injury action, a New York trial court has entered an order requiring appellant Club Mediterranee, S.A. (Club Med) to answer interrogatories propounded by appellees. The questions on this appeal are (1) whether such an order is invalid under the Supremacy Clause (U.S. Const. Art. VI, Cl. 2) and the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444, entered into force for the United States on October 7, 1972, and for France on October 8, 1974

[hereinafter cited as Evidence Convention], set forth at J.S. App. 19a-79a; and (2) whether such an order is invalid under principles of international comity.

Appellees filed this action in the Supreme Court of the State of New York against Club Med, a French corporation, for injuries allegedly sustained by appellee Marjorie Dorin while a guest at a Club Med resort in Haiti from December 1981 to January 1982 (J.S. 5-6). Pursuant to New York law,[1] counsel for the Dorins served interrogatories on Club Med's counsel (J.S. App. 97a-101a).[2] Club Med moved to strike the interrogatories on the grounds, inter alia, that they violated the Supremacy Clause and the Evidence Convention and were invalid under principles of international comity (Appellant's Reply Br. 1a-9a). Club Med asserted, in this regard, that the information necessary to respond to the interrogatories was available only in France and that answering the interrogatories would violate a French penal statute.[3] The court struck four interrogatories on other grounds (J.S. App. 5a), but rejected Club

---

[1]Under New York law,

> [i]nterrogatories shall be answered in writing under oath by the party upon whom served, if an individual, or, if the party served is a corporation, a partnership, or a sole proprietorship, by any officer, director, agent or employee having the information.

N.Y. Civ. Prac. R. 3134(a) (McKinney 1970).

[2]The interrogatories seek information concerning (1) Club Med's relationship with the facility in Haiti, including all documents that describe that relationship; (2) construction of the Club Med facility in Haiti; (3) the existence of an operational manual for the facility; (4) whether employees are required to take appropriate shots for typhoid fever and malaria; (5) whether the Haiti facility's sanitation, food storage and preparation, and water systems have been inspected, and the results of such inspections; (6) management and medical personnel at the Haiti facility (J.S. App. 97a-101a).

[3]The French statute cited by Club Med, Law No. 80-538 of July 16, 1980, Art. 1 *bis*, is set forth at page 12, *infra*.

Med's arguments based on the Evidence Convention, stating that "the Hague Convention proscribes the taking of evidence * * * only in *French Territory*" (J.S. App. 6a; emphasis in original).

Club Med appealed the trial court's order compelling it to respond to the interrogatories. The Appellate Division affirmed without opinion (J.S. App. 1a-2a), and denied leave to appeal to the New York Court of Appeals (J.S. App. 3a-4a).[4]

DISCUSSION

This case presents important questions concerning the proper procedures to be followed by United States courts in ordering discovery where the party from whom discovery is sought claims that the information necessary to respond to the discovery request is located in a foreign state that is a party to the Hague Evidence Convention. The questions presented are whether the procedures specified in the Convention are exclusive and, if not, whether principles of international comity nevertheless require that the Convention's procedures be exhausted before the court may resort to traditional state and federal discovery devices.

It is our position that the Evidence Convention is not exclusive and that therefore the order of the New York trial court does not conflict with any treaty obligations of the United States under the Convention. With respect to the comity issue, we submit that the determination whether the Evidence Convention's procedures should be employed in the first instance depends on the facts and circumstances of each case. As we explain below, because the state trial court did not undertake a balancing of the relevant interests necessary to a proper comity analysis, this case does not

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[4]The Chief Justice subsequently stayed the trial court's order pending this Court's consideration of the instant appeal (J.S. App. 17a).

provide this Court with an adequate record on which to decide the comity issue. Accordingly, we do not believe that the comity issue warrants review by this Court at the present time.[5]

1. a. The Evidence Convention provides methods for United States courts and litigants to obtain evidence abroad. Most civil law countries, including France, provide much less freedom to litigants in the collection of evidence for use in foreign proceedings than do the United States and, to a lesser extent, other common law countries. Edwards, *Taking of Evidence Abroad in Civil or Commercial Matters,* 18 Int'l & Comp. L.Q. 646, 647 (1969). This is because civil law countries regard the taking of evidence as a judicial function rather than as an act of the parties; when evidence is taken without the participation or consent of officials of the host country, the host country may consider

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[5]We note that this Court appears to lack jurisdiction over this case except by way of certiorari under 28 U.S.C 1257(3), as requested in the alternative by appellant pursuant to 28 U.S.C. 2103 (see J.S. 22). Appellate jurisdiction under 28 U.S.C. 1257(1) clearly is not appropriate here, because the state courts have issued no decision in this case against the validity of a treaty. Similarly, jurisdiction by way of appeal under 28 U.S.C. 1257(2) also is unavailable. The record, as reflected in the papers filed in this Court, does not reveal that appellant explicitly challenged the validity of the New York statute as applied, but rather shows that appellant attacked the particular actions of the trial court as invalid on federal grounds. There is therefore no jurisdiction under 28 U.S.C. 1257(2). See *Richmond Newspapers, Inc.* v. *Virginia,* 448 U.S. 555, 562-563 n.4 (1980) (plurality opinion); *Hanson* v. *Denckla,* 357 U.S. 235, 244 & n.4 (1958); *Charleston Federal Savings & Loan Ass'n* v. *Alderson,* 324 U.S. 182, 185-187 (1945). This case, like virtually every case, involves judicial actions taken pursuant to procedures established by statute or rule. No distinction in the statute itself is challenged, as in *Mayer* v. *City of Chicago,* 404 U.S. 189 (1971), and *In re Griffiths,* 413 U.S. 717, 718 (1973), and no assertedly unconstitutional application of a substantive state statute is involved, as in *Japan Line, Ltd.* v. *County of Los Angeles,* 441 U.S. 434, 440-441 (1979), and *Cohen* v. *California,* 403 U.S. 15, 17-18 (1971).

that its "judicial sovereignty" has been violated. See *ibid.; Report of United States Delegation to the Eleventh Session of the Hague Conference on Private International Law*, 8 Int'l Legal Materials 785, 804, 806 (1969). Prior to the Convention, courts and litigants frequently encountered problems in obtaining evidence abroad from countries with different legal systems. See S. Exec. Rep. 92-25, 92d Cong., 2d Sess. 1 (1972). The Convention was designed to minimize such difficulties in the future by establishing "greater flexibility in the means available for obtaining evidence abroad." *Id.* at 4.

The Evidence Convention provides for three alternative methods of conducting evidence taking proceedings abroad in connection with civil or commercial litigation in United States courts: (1) a letter rogatory (called in the English text of the Convention a "letter of request") transmitted through a foreign "Central Authority" to a foreign court, which conducts the proceeding (Arts. 1-14); (2) notice to appear before an American diplomat or consular officer (Arts. 15-16); and (3) designation of a private commissioner to take evidence (Art. 17). The three methods correspond to those provided for by Fed. R. Civ. P. 28(b).[6] As the Report on the Convention states, the basic principle underlying the Convention is that "[a]ny system of obtaining evidence or securing the performance of other judicial acts internationally must be 'tolerable' in the State of execution and must also be 'utilizable' in the forum of the State of origin where the action is pending." Amram, *Explanatory Report on the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, reprinted in Message from the President Transmitting the Convention on the Taking of*

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[6]Because the second and third methods do not involve proceedings before a judge of the host country, they are subject to strict limitations in the Convention. See S. Exec. Rep. 92-25, *supra*, at 4-5.

Evidence Abroad in Civil or Commercial Matters, S. Exec. A, 92d Cong., 2d Sess. 11 (1972).

The Convention itself does not contain a definition of the term "obtain evidence." However, some guidance to the meaning of that term is provided by the language of the Convention. Subsections (e), (f) and (g) of Article 3 show that a letter of request "may be used to 'examine' persons and to put 'questions' to them, or to secure the 'inspection' of 'documents or other property, real or personal.' " S. Exec. A, *supra,* at 13. For purposes of this case, we assume that the Convention procedures may be used to obtain answers to interrogatories such as those propounded by appellees.

b. Traditionally, United States courts have held that if they have jurisdiction over a foreign party or witness, they may require that party or witness to comply with a discovery request under pain of sanctions. See, *e.g., United States* v. *First National City Bank,* 396 F.2d 897, 900-901 (2d Cir. 1968); *Volkswagenwerk, A.G.* v. *Superior Court* 123 Cal. App.3d 840, 856-857, 176 Cal. Rptr. 874, 883-884 (1981); *In re Uranium Antitrust Litigation,* 480 F. Supp. 1138, 1144 (N.D. Ill. 1979). Of course, whether and at what point the court should exercise this authority in a given case depends on a number of factors, which we will address below in our discussion of the comity issue. The initial question, however, is whether the Evidence Convention supersedes state and federal discovery procedures. This question is one of federal law to be determined by the intent of the parties to the treaty, and the starting point for analysis is the language of the treaty itself. See *Sumitomo Shoji America, Inc.* v. *Avagliano,* 457 U.S. 176, 180 (1982).

Unlike the Hague Service Convention,[7] which was concluded several years earlier and which expressly provides that it is exclusive,[8] the Evidence Convention contains no express provision for exclusivity. In addition, as one commentator has noted, "extraterritorial discovery has been a standard practice of American courts for some time," and there is "no evidence that the American negotiators, the Department of State, or the Congress intended to prohibit this practice entirely." Oxman, *The Choice Between Direct Discovery and Other Means of Obtaining Evidence Abroad: The Impact of the Hague Evidence Convention,* 37 U. Miami L. Rev. 733, 760 (1983). On the contrary, the Senate Report emphasized that the Convention was intended to improve the means for securing evidence abroad. See S. Exec. Rep. 92-25, *supra,* at 1, 3. The Senate Report quoted the following statement in support of ratification made by Philip Amram, United States representative to the commission that drafted the Convention and rapporteur of the commission (S. Exec. Rep. 92-25, *supra,* at 5):

> [The Convention] makes no major changes in United States procedure and requires no major changes in United States legislation or rules. On the other front, it will give United States courts and litigants abroad enormous aid by providing an international agreement for the taking of testimony, the absence of which has created barriers to our courts and litigants.

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[7]Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, entered into force for the United States, February 10, 1969.

[8]Article 1 of the Service Convention (20 U.S.T. at 362) provides: "The present Convention shall apply in all cases in civil or commercial matters where there is occasion to transmit a judicial or extrajudicial document for service abroad."

See also S. Exec. A, *supra,* at XI ("A significant aspect of the Evidence Convention is the fact that although it requires little change in the present procedures in the United States it promotes changes, in the direction of modern and efficient procedures, in the present practices of many other states."). "Absent an express provision in the treaty that a longstanding practice valued by at least some members of the American bar was being abolished — a factor that could indeed have affected the United States decision to ratify the convention — it is unreasonable to conclude that the convention implies such a prohibition." Oxman, *supra,* 37 U. Miami L. Rev. at 760.

Although most of the reported decisions require resort to the Evidence Convention as a matter of international comity (see pages 12-13, *infra*), none holds that the Convention is exclusive and therefore supersedes traditional discovery methods. The consequences of such a holding would be adverse to United States interests. It would give foreign signatory states the final say in determining the extent of extraterritorial discovery to be permitted in American courts. As a result, litigants in United States courts might find it impossible to obtain necessary discovery from foreign based parties. The problems engendered by a holding of exclusivity are underscored by the fact that most of the signatory states, including France, have exercised their right under Article 23 of the Evidence Convention not to obligate themselves to honor requests for pretrial discovery of documents.[9] While the precise import of Article 23 is highly uncertain (see Oxman, *supra,* 37 U. Miami L. Rev. at 771-779), it is our view that the Convention cannot be

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[9]Article 23 provides that a contracting state may "declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries" (J.S. App. 28a).

construed as absolutely restricting the authority of United States courts to employ traditional discovery devices specified in federal and state rules.[10] Accordingly, we submit that the order of the New York court requiring Club Med to respond to interrogatories does not violate the international law obligations of the United States under the Evidence Convention.

2. The question remains whether, as a matter of comity, United States courts should be required to exhaust the procedures of the Evidence Convention before resorting to more traditional means of discovery that may offend the foreign government.

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[10]We recognize that in our brief in *Volkswagenwerk, A.G.* v. *Falzon*, No. 82-1888 (at 6), we stated:

> The parties to the Convention contemplated that proceedings not authorized by the Convention would not be permitted. The Convention accordingly must be interpreted to preclude an evidence taking proceeding in the territory of a foreign state party if the Convention does not authorize it and the host country does not otherwise permit it.

After further reflection, we believe that that statement requires clarification to the extent that it could be construed to mean that the Convention is exclusive.

We note that the above statement was not necessary to our argument that the trial court's order in *Falzon* was unlawful. The trial court in *Falzon* ordered that employees of a foreign corporation be deposed in Germany before an American consular officer. Under established principles of both domestic and international law, however, American courts are precluded from ordering anyone to participate in discovery proceedings in the territory of a foreign state absent that state's consent, wholly independent of the Evidence Convention. See Oxman, *supra*, 37 U. Miami L. Rev. at 751. Because Germany's consent to such discovery was limited to means authorized by the Convention, the court in *Falzon* could order such proceedings in Germany only if authorized by the Convention.

a. It is well settled that United States courts should refrain, if possible, from ordering a person to perform an act that would violate the laws or clearly articulated policies of a foreign government.

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton v. *Guyot*, 159 U.S. 113, 163-164 (1895). See *Laker Airways, Ltd.* v. *Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984); *United States* v. *First National Bank*, 699 F.2d 341, 345-347 (7th Cir. 1983); *United States* v. *Vetco, Inc.*, 691 F.2d 1281, 1288-1291 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); *United States* v. *First National City Bank*, 396 F.2d at 901-905. Cf. *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1958).

In undertaking a comity analysis, the courts must balance the competing factors involved. Some of those factors are set forth in the Restatement (Second) of Foreign Relations Law of the United States § 40 (1965), which provides:

> Where two states have jurisdiction to prescribe and enforce rules of law and the rules they may prescribe require inconsistent conduct upon the part of a person, each state is required by international law to consider, in good faith, moderating the exercise of its enforcement jurisdiction, in the light of such factors as
>
> (a) vital national interests of each of the states,

(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,

(c) the extent to which the required conduct is to take place in the territory of the other state,

(d) the nationality of the person, and

(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.[11]

---

[11]See also Restatement (Revised) of Foreign Relations Law of the United States § 420 (Tent. Draft No. 3, 1982):

Requests for Disclosure and Foreign Government Compulsion.

(1)(a) Where authorized by statute or rule of court, a court in the United States may order a person before the court to produce documents or other information directly relevant, necessary, and material to an action or investigation, even if the information or the person in possession of the information is located outside the United States.

(b) Failure to comply with an order to produce information may subject the person to whom the order is directed to sanctions, including contempt or dismissal of a claim or defense, or to a finding by the court that the facts to which the order was addressed are as asserted by the opposing party.

(c) In issuing an order directing production of documents or other information located abroad, a court in the United States must take into account the importance to the investigation or litigation of the documents or other information requested; the degree of specificity of the request; in which of the states involved the documents or information originated; the extent to which compliance with the request would undermine important interests of the state where the information is located; and the possibility of alternative means of securing the information.

(2) If disclosure of information located outside the United States is prohibited by a law or regulation of the state in which the information or prospective witness is located, or by the state of nationality of the prospective witness,

b. The state court's discovery order in this case implicates principles of comity because if Club Med responds to the interrogatories it could be in violation of the French blocking statute. That statute provides (J.S. App. 89a):

> Art. 1 *bis*. Subject to treaties or international agreements and to the laws and regulations in force, every person is forbidden to request, to seek or to communicate, in writing, orally or in any other manner, documents or information of an economic, commercial, industrial, financial or technical nature intended to serve as evidence in foreign judicial or administrative proceedings or within the scope of the latter.

The blocking statute is apparently intended to ensure that United States litigants seeking to obtain evidence located in France will resort to the procedures authorized by the Evidence Convention (see J.S. App. 93a-96a).

To the extent that the discovery order involved here conflicts with the French blocking statute, that conflict could be resolved by requiring the use of the Evidence Convention procedures. Indeed, we note in this regard that a number of courts have held that principles of international comity require resort to the Convention procedures

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(a) the person to whom the order is directed may be required by the court to make a good faith effort to secure permission from the foreign authorities to make the information available;

(b) the court may not ordinarily impose the sanction of contempt, dismissal, or default on the party that has failed to comply with the order for production, except in cases of deliberate concealment or removal of information or of failure to make a good faith effort in accordance with paragraph (a);

(c) the court may, in appropriate cases, make findings of fact adverse to a party that has failed to comply with the order for production, even if that party has made a good faith effort to secure permission from the foreign authorities to make the information available and that effort has been unsuccessful.

where traditional state or federal discovery procedures are found to conflict with the laws or policies of the foreign country where the evidence is located. See, *e.g., Pierburg GmbH & Co.* v. *Superior Court,* 137 Cal. App. 3d 238, 245, 186 Cal. Rptr. 876, 881 (1982); *Volkswagenwerk, A.G.* v. *Superior Court,* 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1981); *Philadelphia Gear Corp.* v. *American Pfauter Corp.,* 100 F.R.D. 58 (E.D. Pa. 1983); *Schroeder* v. *Lufthansa German Airlines,* 18 Av. Cas. (CCH) 17,222 (N.D. Ill. Sept. 15, 1983). But see, *e.g., Graco, Inc.* v. *Kremlin, Inc.,* 101 F.R.D. 503 (N.D. Ill. 1984); *Lasky* v. *Continental Products Corp.,* 569 F. Supp. 1227 (E.D. Pa. 1983). It is our position that, in appropriate cases, United States courts should utilize the procedures established in the Evidence Convention in order to avoid international friction arising from the enforcement of extraterritorial discovery orders. Thus, where a trial court determines that a conflict between a foreign blocking statute and state or federal discovery rules cannot be reconciled in a given case other than through resort to the Evidence Convention, the court, as part of a proper comity analysis, should consider whether to require the litigants to proceed in conformity with the Convention. See Oxman, *supra*, 37 U. Miami L. Rev. at 779-783. If the court does so require and the evidence is not forthcoming after resort to the Convention's procedures, the court would retain the authority to order the litigant from whom discovery is sought, upon pain of sanctions, to produce the evidence located abroad.

c. Whether this is an appropriate case for requiring utilization of the Evidence Convention's procedures depends on a balancing of the pertinent factors, such as the likelihood of success in obtaining the requested discovery through the Convention and the extent of the delay and expense involved in requiring resort to the Convention. See also

pages 10-12 and note 11, *supra*.[12] Moreover, it also may be appropriate for the trial court in a particular case to consider whether an apparent conflict of laws between state or federal discovery rules and a foreign blocking statute may be reconcilable without proceeding under the Evidence Convention. Here, for example, although the French blocking statute demonstrates that France's general policy is to require resort to the Convention, that policy may be subject to exceptions in individual cases. It may well be that, despite the broad language of the blocking statute, France might consider the discovery request in this case to be de minimis and would not oppose Club Med's compliance with that request. See Oxman, *supra*, 37 U. Miami L. Rev. at 782.

The courts below, however, do not appear to have engaged in the balancing of pertinent interests necessary to a proper comity analysis. In the absence of any express findings by the courts below on the comity issue, we are of the view that it would be inappropriate for this Court to undertake in the first instance to balance the relevant factors. Accordingly, we submit that the comity issue does not warrant review in the present posture of the case.[13] In the

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[12]The Evidence Convention, by its terms, applies only to civil and commercial litigation, and not to criminal or quasi-criminal investigations and enforcement proceedings conducted by governmental entities. Consequently, this case does not present any issue concerning the use of grand jury subpoenas or administrative summonses to obtain records located in foreign countries. See, *e.g.*, *Marc Rich & Co., A.G.* v. *United States*, 707 F.2d 663 (2d Cir. 1983), cert. denied, No. 82-2011 (June 27, 1983); *United States* v. *Vetco, Inc.*, *supra*; *In re Grand Jury Proceedings (Bank of Nova Scotia)*, 691 F.2d 1384 (11th Cir. 1982), cert. denied, No. 82-1531 (June 13, 1983).

[13]For purposes of this brief, we have assumed that, because of the federal government's overriding interest in foreign relations, the validity of the state court's discovery order under principles of international comity is a question of federal common law and is ultimately reviewable in this Court. See *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 424-427 (1964); *Zschernig* v. *Miller*, 389 U.S. 429 (1968); Oxman, *supra*, 37 U. Miami L. Rev. at 789-790 n.151.

event that the Court were to deny review at this time, we believe it appropriate for appellant to seek reconsideration of the discovery order in the state courts (assuming state law otherwise permits) in light of the position that we have set forth in this brief.

CONCLUSION

The appeal should be dismissed and the alternative petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 83-461

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In The

Supreme Court of the United States

October Term, 1983

CLUB MEDITERRANEE, S.A., a Foreign Corporation,

Appellant,

vs.

MARJORIE SCHLOSSBERG DORIN and PHILIP DORIN,

Appellees.

On Appeal from the New York Supreme Court, Appellate Division, First Department

MOTION OF APPELLEES TO DISMISS AND APPENDIX

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QUESTIONS PRESENTED

1. Has appellant met its factual burden of demonstrating that the interrogatories at issue require an investigation in French territory, involve obtaining evidence of French nationals on French soil or seek to compel French nationals to submit to New York State discovery procedures in France?

2. Has appellant demonstrated the requisite good faith by seeking a waiver of the application to it of the provisions of Article I bis of the Law of July 16, 1980?

3. Does the Convention On the Taking of Evidence Abroad in Civil or Commercial Matters, 28 U.S.C. §1781, preempt local court rules regarding discovery?

4. Is appellant estopped from asserting the application of the Convention On the Taking of Evidence Abroad in Civil or Commercial Matters, 28 U.S.C. §1781 or asserting an excuse for not answering the subject interrogatories on the grounds of the provisions of Article I bis of the Law of July 16, 1980?

5. Has the appellant properly and timely raised the issues set forth in its jurisdictional statement before the trial court and the Appellate Division, First Department of the New York Supreme Court?

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Argument:

I. Appellant has failed to factually demonstrate that appellee's interrogatories require an investigation in French territory, involve obtaining evidence of French nationals on French soil or seek to compel French nationals to submit to New York State discovery procedures in France. 9

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II. To the extent appellant seeks to excuse itself from answering the interrogatories because of possible sanctions set forth in Article I bis of the Law of July 16, 1980, it has failed to demonstrate the requisite good faith in seeking a waiver of the application of said law. 10

III. The application of the Evidence Convention to the exclusion of local court rules is discretionary at best. 11

IV. Appellant is estopped from asserting that appellees must proceed via the Evidence Convention to the exclusion of local court rules and that appellant should be excused from compliance with local court rules on the grounds of foreign non-disclosure law. 14

V. There is no basis for jurisdiction under 28 U.S.C. §1257(1), 28 U.S.C. §1257(2) or 28 U.S.C. §1257(3). 14

Conclusion 15

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APPENDIX

Appellant's Motion Pursuant to CPLR §3133 Seeking to Strike Plaintiff's Interrogatories Dated September 14, 1982 . 1a

No. 83-461

In The

Supreme Court of the United States

October Term, 1983

CLUB MEDITERRANEE, S.A., a Foreign Corporation,

Appellant,

vs.

MARJORIE SCHLOSSBERG DORIN and PHILIP DORIN,

Appellees.

On Appeal from the New York Supreme Court, Appellate Division, First Department

MOTION TO DISMISS APPEAL

The appellees, respectfully, move the court under Rule 16 to dismiss this appeal because there is no basis for jurisdiction under 28 U.S.C. §1257(1), 28 U.S.C. §1257(2) or 28 U.S.C. §1257(3); because the federal question sought to be reviewed was not timely or properly raised and was not expressly passed on by the court below; because appellant has failed to factually demonstrate that the evidence sought would require an investigation in French territory or involve obtaining evidence of French nationals on French soil; because the appellant has failed to demonstrate the requisite good faith in seeking to excuse compliance with local court rules based upon the provisions of French "non-disclosure" law; because appellant is estopped from evading local court rules by its vigorous utilization of the very rules it asserts are invalid; and because the appeal is without merit.

STATEMENT OF THE CASE

Prior to December 26, 1982, appellees, residents of the State of New York, purchased from appellant, Club Mediterranee, S.A., and its alter-ego,[1] Club Med, Inc. (hereinafter jointly referred

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1. At p. 6 of its jurisdictional statement appellant asserts that it does not maintain any office in the United States and that the relationship between it and Club Med, Inc. is one of principal and agent. These assertions have not been proven and, in fact, the complaint contains allegations to the contrary.

Paragraph 2 of the complaint states:

> "Upon information and belief, Club Mediterranee, S.A. is a Frence Corporation doing substantial business in New York State through its agent and joint venturer Club Med, Inc. Club Mediterranee, S.A. (hereinafter 'Club Med, S.A.') is in the business of owning, managing, operating and promoting hotels and 'villages', one of which is located in Haiti (hereinafter 'Haiti Village'). Club Med, S.A. is also in the business of promoting, organizing and marketing vacation tours featuring transportation and accommodations at the Haiti Village".

Paragraph 3 of the complaint states:

> "Upon information and belief, Club Med, Inc. is a New York Corporation with offices at 40 West 57th Street, New York, New York and is in the business of organizing, arranging and executing vacation tours featuring accommodations at the hotels and villages owned and managed by Club Med, S.A., to include the Haiti Village".

Paragraph 4 of the complaint states:

> "Upon information and belief, Club Med, Inc. is controlled, managed and operated by Club Med, S.A. for the primary benefit of Club Med, S.A.; Club Med, Inc. and Club Med, S.A. share facilities, management, information and financial resources to such an extent that they constitute a single business entity."

to as "Club Med") a package tour vacation[2] featuring round trip air transportation, seven days accommodations at a Club Med resort facility located in the Republic of Haiti and other services. During their stay at the Club Med facility in Haiti the appellee, Marjorie Schlossberg Dorin, contracted typhoid fever and sustained physical injuries arising therefrom.

The Pleadings

The complaint in this action was served on appellant at the offices of Club Med, Inc. at 40 West 57th Street, New York, New York on February 25, 1982. Thereafter, appellant and Club Med, Inc., in a single pleading, answered the complaint, did not challenge service or jurisdiction, asserted no affirmative defenses and cross claimed against other defendants in the lawsuit.

Club Med's Vigorous Utilization of the CPLR

In accordance with New York State's Civil Practice Law and Rules (hereinafter "CPLR") Club Med vigorously sought discovery of appellees by serving (1) a Demand For A Verified Bill Of Particulars (CPLR §3041), (2) a Demand Pursuant to Section 2103 Of The CPLR, (3) a Demand For Names And Addresses Of Witnesses (CPLR §3101), (4) a Demand For Medical

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2. The package tour vacation in issue was sold by Club Med pursuant to the Special Regulations of the Civil Aeronautics Board (14 *Code of Federal Regulations* §380) [*See Irving Trust Company v. Nationwide Leisure Corporation*, 562 F. Supp. 960, 969 (S.D.N.Y. 1982)]. It is unlikely that appellant can both avail itself of the economic benefits to be derived from operating charter tour programs pursuant to federal regulations and at the same time seek to evade its responsibilities and obligations of appearing in local courts and cooperating with local court rules regarding discovery.

Information And Hospital Authorizations (CPLR §3101) and (5) a Demand For A Statement (CPLR §3101). Thereafter, Club Med moved (CPLR §3042) for sanctions against appellees for their alleged failure to serve a proper verified bill of particulars.

Beyond its vigorous discovery efforts, Club Med utilized the CPLR on behalf of its co-defendant, Societe Generale, in moving to dismiss [CPLR §3211(a)(1) & §3211(a)(7)] the Eighth Cause of Action in the complaint. After this motion was denied, Club Med filed a notice of appeal (CPLR §5515) and filed its appeal on behalf of Societe Generale (CPLR §5530) with the Appellate Division, First Department of the New York Supreme Court for hearing during the September Term, 1983.

Club Med's Vigorous Resistance to Appellees' Utilization of the CPLR

Although more than willing to use the CPLR when it suited its purposes, Club Med has been somewhat reticent in responding to appellees' discovery efforts. On or about September 14, 1982 appellees served on Club Med their first set of interrogatories (Jurisdictional Statement at 97a-101a) pursuant to CPLR §3130. The interrogatories sought information regarding Club Med's resort facility located in the Republic of Haiti. In response, Club Med moved (Appendix p. 1a) for an order vacating the interrogatories on the grounds that "As the annexed Memorandum of Law[3] indicates, the aforesaid interrogatories are barred pursuant

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3. Club Med's memorandum of law before the trial court contained the following points:

Point I — Discovery Proceedings as Issues Herein Are Governed by the Provisions of the Hague Convention.

(Cont'd)

to international law and treaty, French criminal and civil law, as well as the laws of the United States and the New York Civil Practice Law and Rules". Among the arguments presented was one to the effect that the interrogatories violated the procedures set forth in the Convention On the Taking of Evidence Abroad in Civil or Commercial Matters, 28 U.S.C. §1781 (hereinafter "Evidence Convention") (Jurisdictional Statement at 19a-79a). In further support of its position before the trial court Club Med introduced a letter of the French Ministry of Justice (Jurisdictional Statement at 93a-96a) discussing the "two methods of investigation in French territory" and noting the perceived relationship[4] between Article I bis of the Law of July 16, 1980 (Jurisdictional Statement at 88a-92a) and the Evidence Convention. Within the context of its motion before the trial court Club Med did not squarely

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(Cont'd)

Point II — Plaintiff's Interrogatories Are A Nullity as a Result of both Defective Form and Improper Service.

Point III — Request for Documents Cannot Be Used Against French Corporations By United States Plaintiff.

Point IV — Club Mediterranee, S.A. Would Violate French Criminal Law By Answering Interrogatories.

Point V — The Hague Convention Bars Discovery That Is Illegal Under French Law.

Point VI — Plaintiffs Interrogatories Exceed the Permissible Area of Inquiry Under New York State Law.

Point VII — Summary Of Law.

4. *See* Batista, *Confronting Foreign "Blocking" Legislation: A Guide to Securing Disclosure from Non- Resident Parties to American Litigation*, The International Lawyer, Vol. 17, No. 1, pp. 63-69, Winter 1982.

challenge the constitutionality of any provision of the CPLR nor did Club Med factually demonstrate that the interrogatories required an investigation in French territory, or involved obtaining evidence of French nationals on French soil, or purported to compel French nationals to submit to New York discovery procedures in France. As appellees pointed out in opposition to appellant's motion before the trial court, Club Med ". . .has made no showing that the data being sought is available only in France. It probably is available here in New York. . .or in Haiti".[5]

The Trial Court's Order

Relying upon Club Med's presentation and, particularly upon the letter of the French Ministry of Justice, the trial court (Jurisdictional Statement at 5a-6a) did not question either the validity of or the enforceability of the Evidence Convention. The trial court did find, however, that the Evidence Convention was inapplicable because, according to Club Med's presentation, ". . .the Hague Evidence Convention proscribes the taking of evidence by the two methods set forth therein only in French territory. . .". In essence, the trial court found that Club Med had failed to factually demonstrate that the interrogatories required an investigation in French territory, or involved obtaining evidence of French nationals on French soil or purported to compel French nationals to submit to New York discovery procedures in France.

The Appellate Division's Affirmance

Instead of seeking to reargue or renew (CPLR §2221) its motion before the trial court and meet its factual burden, Club

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5. Affidavit In Opposition of Thomas A. Dickerson sworn to November 26, 1982 at p. 14.

Med chose to file a notice of appeal with the Appellate Division, First Department of the New York Supreme Court seeking reversal of the trial court's order. In the subsequent appeal, Club Med, in its brief for defendant-appellant,[6] set forth a single question for consideration;

> "QUESTION PRESENTED
>
> Are the interrogatories propounded by plaintiffs in contravention of and prohibited by the terms of the Hague Evidence Convention?"

On its appeal Club Med did not squarely challenge the constitutionality of any provision of the CPLR. In addition, by limiting itself to the one "Question Presented", Club Med waived consideration by the Appellate Division of those other grounds which it had presented to the trial court, *i.e.*, that the

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6. Club Med's brief for defendant-appellant contained the following points:

Point I — Discovery Proceedings Herein Against Club Mediterranee, S.A. Are Regulated by the Provisions of the Hague Evidence Convention.

Point II — Plaintiff's Interrogatories are a Nullity Pursuant to the Provisions of the Hague Evidence Convention.

Point III — Club Mediterranee, S.A. Would Violate French Criminal Law By Answering Interrogatories.

Point IV — The Hague Evidence Convention Bars Discovery That Is Illegal Under French Law.

Point V — The Court Below, Respectfully, Erred In Its Interpretation and Application Of The Treaty (and Federal Law) in Question.

Point VI — Summary of Law.

interrogatories violate French criminal and civil law. The Appellate Division affirmed the trial court's order without comment (Jurisdictional Statement at 7a-8a).

Club Med's Motion Before The Appellate Division

Instead of seeking to reargue [Rule §600.14(a) of the Appellate Division, First Department, McKinney's New York Rules of Court, 1982 Edition] its position before the Appellate Division and squarely challenge the constitutionality of those provisions of the CPLR which it now seeks to challenge (Jurisdictional Statement at 80a-82a) as well as set forth the other grounds waived on its appeal, Club Med moved [CPLR §5602(b)(1)] before the Appellate Division for leave to file an appeal with the New York Court of Appeals and for certification of three questions of law (Jurisdictional Statement at 106a). The Appellate Division denied[7] Club Med's motion (Jurisdictional Statement at 3a-4a) without comment. Thereafter, Club Med filed a notice of appeal (Jurisdictional Statement at 9a-16a) to this Court and obtained a stay (Jurisdictional Statement at 17a) of further proceedings pending the filing of the instant appeal.

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7. *See* Hopkins, *The Role Of An Intermediate Appellate Court*, 41 Brooklyn Law Review 459, 468-470 (1975).

ARGUMENT

I.

Appellant has failed to factually demonstrate that appellee's interrogatories require an investigation in French territory, involve obtaining evidence of French nationals on French soil or seek to compel French nationals to submit to New York State discovery procedures in France.

The instant lawsuit involves events at a Club Med resort facility located in the Republic of Haiti, a non-signatory to the Evidence Convention. Whether answering the subject interrogatories would involve information located in New York State, in the Republic of Haiti or in France has not been established factually at anytime in the proceedings below. Appellant's assertions at footnote "2." at page "6" of its jurisdictional statement do not rise to the level of factual proof as to what answering the interrogatories would entail. The trial court expressly found that appellant had failed to meet this factual burden.

Cases and articles discussing the application of the Evidence Convention have uniformly dealt with obtaining documents, making physical inspections or deposing witnesses, all of which have been located in a foreign country which is a signatory to the Evidence Convention [*Volkswagenwerk v. Superior Court*, 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1981); *Rio Tinto Zinc Corp.*, 1978 A.C. 547, 559 (Great Britian); *Pain v. United Technologies Corp.*, 637 F. 2d 775, 786-790 (D.C. Cir. 1980); Platto, *Taking Evidence Abroad For Use In Civil Cases In the United States—A Practical Guide,* The International Lawyer, Vol. 16, No. 3, pp. 575-585, Summer 1982; Carter, *Existing Rules and Procedures*, The International Lawyer, Vol. 13, No. 5, pp. 5-7, Winter 1979]. This has also been true of cases involving the application for foreign "non-disclosure" laws [*Societe Internationale v. Rodgers,* 357 U.S. 197 (1958); *Arthur Andersen*

v. Finesilver, 546 F. 2d 338 (10th Cir. 1976), *cert. den.* 429 U.S. 1096 (1977); *In Re Oil Spill by Amaco Cadiz,* 93 F.R.D. 840 (N.D. Ill. 1982); *Ghana Supply Commission v. New England Power Company,* 83 F.R.D. 586 (D. Mass. 1979); *Note: Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production,* Virginia Journal of International Law, Vol. 14, pp. 747-774 (1974)].

Were the evidence sought located in New York State or in the Republic of Haiti, appellant would be unable to avail itself of either the Evidence Convention or the excuse of non-compliance because of foreign "non-disclosure" law. To the extent the evidence were located in the Republic of Haiti, a non-signatory to the Evidence Convention, the following analysis would apply. Article 11 of the Evidence Convention makes clear that a "privilege or duty to refuse to give the evidence" regarding Letters of Request can only arise "under the law of the State of execution" or "under the law of the State of origin." As for discovery of evidence located in a third country, the legislative history to the Evidence Convention [*see American Society of International Law, International Legal Materials,* Vol. 8, pp. 811-812 (1969)] makes clear that such privileges or duties could not be asserted.

II.

To the extent appellant seeks to excuse itself from answering the interrogatories because of possible sanctions set forth in Article I bis of the Law of July 16, 1980, it has failed to demonstrate the requisite good faith in seeking a waiver of the application of said law.

As to appellant's assertion that it would be subject to criminal

sanctions[8] pursuant to Article I bis of the Law of July 16, 1980, appellant has made no showing that it (1) attempted to seek a waiver of this "non-disclosure" law [*Societe Internationale v. Rodgers,* 357 U.S. 197 (1958); *In Re Westinghouse Electric Corp.,* 563 F. 2d 992 (10th Cir. 1977); *Arthur Andersen v. Finesilver,* 546 F. 2d 338 (10th Cir. 1976), *cert. den.* 429 U.S. 1096 (1977); *Ghana Supply Commission v. New England Power Company,* 83 F.R.D. 586 (D. Mass. 1979)] and (2) upon such a showing been denied a waiver of the subject "non-disclosure" law [*Note: Discovery of Documents Located Abroad in U.S. Antitrust Litigation: Recent Developments in the Law Concerning the Foreign Illegality Excuse for Non-Production,* Virginia Journal of International Law, Vol. 14, pp. 750-751 (1974)] ["The Court made three other strong suggestions in *Societe Internationale* which are often cited. The first is that there is a very substantial requirement of good faith on the part of the party seeking to avoid the consequences of failure to comply with a valid discovery order on grounds of foreign criminal liability. The Court strongly implied a requirement that the party seek a waiver of the prohibiting law from the foreign country. . ."]. The letter introduced by appellant at pp. 93a-96a of the jurisdictional statement was not generated as a result of this lawsuit.

III.

The application of the Evidence Convention to the exclusion of local court rules is discretionary at best.

Appellant asserts that the Evidence Convention supercedes and takes precedence over domestic court rules regarding discovery.

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8. It appears that such sanctions are totally illusory. *See* Batista, *Confronting Foreign "Blocking" Legislation: A Guide to Securing Disclosure from Non-Resident Parties to American Litigation,* The International Lawyer, Vol. 17, No. 1, pp. 63-69, Winter 1982.

Contrary to this assertion, the Evidence Convention does not preempt any procedural rule regarding discovery utilized by the courts of a signatory country and the enforcement of the Evidence Convention to the exclusion of local court rules is within the discretionary powers of local courts.

Article 27 of the Evidence Convention states:

> "The provisions of the present Convention shall not prevent a Contracting State from—
>
> . . . .
>
> (b) permitting by internal law or practice, any act provided for in this Convention to be performed upon less restrictive conditions;
>
> (c) permitting, by internal law or practice, methods of taking evidence other than those provided for in this Convention."

The legislative history to the Evidence Convention [*American Society of International Law, International Legal Materials,* Vol. 8, pp. 807-808, 818 (1969)] states that the Evidence Convention shall not preempt local law;

> "While the proposed Convention provides a substantial number of improvements over existing practice, it is important to emphasize that the Convention is designed to set minimum standards for international assistance.
>
> . . . .
>
> "All of this, of course, is subject to the general rule of Article 27 that any more liberal practice

> in any signatory State which permits any act to be performed upon less restrictive conditions, under internal law or practice, remains in full force and effect and is in no way limited by the restrictions or limitations of the Convention."

In *Volkswagenwerk v. Superior Court,* 123 Cal. App. 3d 840, 859, 176 Cal. Rptr. 874 (1981), the California Supreme Court stated:

> "We could perhaps read the Hague Convention broadly, as a preemptive and exclusive rule of international evidence gathering, binding upon us as the supreme law of the land under section 2 of article VI of the federal constitution. But we prefer to believe that the Hague Convention establishes not a fixed rule but rather a minimum measure of international cooperation; our reading of article 27 of the convention encourages us to conclude that this is, indeed, what the ratifying states intend."

Since the application of the Evidence Convention to the exclusion of local court rules is a discretionary matter within the purview of the trial court, the proper approach to considering this issue is a "case-by-case process of balancing the interests of the respective sovereignties to reach an appropriate accommodation of the law of the forum with the concepts of due process and international comity" [*Volkswagenwerk v. Superior Court*, 123 Cal. App. 3d 840, 857, 176 Cal. Rptr. 874 (1981)]. It can not be stated that appellant specifically addressed or even considered this "balancing of interests" approach in its presentation before the trial court or the Appellate Division.

IV.

Appellant is estopped from asserting that appellees must proceed via the Evidence Convention to the exclusion of local court rules and that appellant should be excused from compliance with local court rules on the grounds of foreign non-disclosure law.

Appellant does substantial business in New York State, has not challenged service of the complaint upon it in New York State, has not challenged the jurisdictional power of the New York State Supreme Court, has crossed claimed against other defendants in the lawsuit, has vigorously utilized the CPLR for discovery of the appellees, has vigorously utilized the CPLR seeking to dismiss a cause of action against its co-defendant, Societe Generale, and has vigorously utilized the CPLR seeking to strike some of the interrogatories propounded by appellees (Jurisdictional Statement at 8a). Under these circumstances it is neither fair nor just to permit appellant to evade local court rules regarding discovery.

V.

There is no basis for jurisdiction under 28 U.S.C. §1257(1), 28 U.S.C. §1257(2) or 28 U.S.C. §1257(3).

Appellant asserts that this Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1257(1), 28 U.S.C. §1257(2) and 28 U.S.C. §1257(3). It can not be demonstrated by appellant that it placed before either the trial court or the Appellate Division on its appeal a question concerning "the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States. . ." [*Japan Line, Ltd. v. County of Los Angeles,* 441 U.S. 434, 440-441 (1978); *Cohen v. California,* 403 U.S. 15, 17-18 (1970); Stern & Gressman, *Supreme Court Practice,* Fifth Edition, §§3.3-3.4]. In appellant's briefs before the trial court and the Appellate Division on its appeal

the appellant did not "make specific and plain . . .[its] contention that the application of the [CPLR] to [its] particular circumstances would make the [CPLR] void under federal law". To the extent such an issue was raised in one of the "Questions" which appellant sought to have certified by Appellate Division (Jurisdictional Statement at 102a-124a) does not cure the fact that it was not presented in a timely manner. Nor can it be stated that either the trial court or the Appellate Division passed on such an issue, assuming it was raised.

CONCLUSION

Wherefore, appellees respectfully submit that the instant appeal should be dismissed by this Court.

Respectfully submitted

THOMAS A. DICKERSON
Attorney for Appellees

APPENDIX — APPELLANT'S MOTION PURSUANT TO CPLR §3133 SEEKING TO STRIKE PLAINTIFF'S INTERROGATORIES DATED SEPTEMBER 14, 1982

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 4777/82

MARJORIE SCHLOSSBERG DORIN and PHILIP A. DORIN,

Plaintiffs,

-against-

CLUB MEDITERRANEE, S.A., CLUB MED, INC., CELEBRITY TRAVEL SERVICE, INC., KENT TRAVEL SERVICE, INC., SOCIETE GENERALE and NATIONAL UNION FIRE INSURANCE,

Defendants.

A 8A Conference has been held. The conference was adjourned by the Judge to permit the parties to submit papers.

S I R S :

PLEASE TAKE NOTICE, that upon the annexed affirmation in support of the instant motion of defendant, CLUB MEDITERRANEE, S.A. the undersigned will move this Court at Special Term, Part 8A thereof, at the courthouse located at 60 Centre Street, New York, New York, on the 30th day of November, 1982 at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order:

1. Pursuant to CPLR §3133, striking plaintiffs' interrogatories;

2. for such other and further relief as to the Court may seem just and proper.

PLEASE TAKE FURTHER NOTICE, that pursuant to CPLR 2214, answering papers, if any, must be served at least five days before the return of this motion.

Dated: New York, New York
November 22, 1982

Yours, etc.,

KROLL, POMERANTZ &
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CLUB MEDITERRANEE, S.A.
500 Fifth Avenue
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

Index No. 4777/82

MARJORIE SCHLOSSERG DORIN and PHILIP A. DORIN,

Plaintiffs,

-against-

CLUB MEDITERRANEE, S.A., et al,

Defendants.

AFFIRMATION

CHRISTOPHER W. CHAN, an attorney duly admitted to practice law before the courts of the State of New York, aware of the penalties for perjury, affirms as follows:

Your affirmant is associated with the law firm of Kroll, Pomerantz & Cameron, attorneys for movant.

Your affirmant submits this affirmation in support of the instant motion for multiple relief.

BASIS OF ACTION

Plaintiffs bring this action against defendant, CLUB MEDITERRANEE, S.A., among others, for injuries allegedly sustained by MARJORIE DORIN at a Club Med resort in the Country of Haiti during the period between December 26, 1981 and January 2, 1982. Defendant, CLUB MEDITERRANEE, S.A., has denied all of the material allegations of the complaint as well as raised various affirmative defenses and cross-claims in its

answer. Copies of the complaint and answer are annexed hereto as Exhibits "A" and "B", respectively.

CLUB MEDITERRANEE, S.A. is a French corporation, duly existing and subject to the laws of the solvent Republic of France.

BASIS FOR MOTION

Plaintiffs have served upon defendant, CLUB MEDITERRANEE, S.A. a set of interrogatories which are annexed hereto as Exhibit "C".

As the annexed Memorandum of Law indicates, the aforesaid interrogatories are barred pursuant to international law and treaty, French criminal and civil law, as well as the laws of the United States and the New York Civil Practice Law and Rules.

The procedure required under the Hague Convention was not even remotely followed here. Plaintiffs sent nothing to the French government, nor did they seek the required assistance from the United States Department of Justice in promulgating and serving proper letters of request upon the French government. They merely drew up their own list of questions and document requests and served them directly upon the undersigned, counsel for CLUB MEDITERRANEE, S.A.

Plaintiffs have not made the slightest effort to comply with the Hague Convention as regards the form and service of the interrogatories. This failure is fatal and plaintiffs' efforts to seek a court order compelling disclosure under a purely unlawful procedure must be denied on this ground alone.

Plaintiffs' interrogatories also are improper under New York law. Plaintiffs are not merely seeking information as to the

operation of the facility which could possibly relate to the alleged contraction of typhoid fever. Rather, they seek to discover obscure details about the construction of the resort, even going so far as requesting, ". . .when consideration was given to the possibility of constructing and operating a Club Med facility in Haiti." Plaintiffs' Interrogatory No. 12. They do not merely seek to obtain information as to possible complaints by guests which might put the defendant on notice of conditions relevant to the issues herein, but they seek, ". . .the name and address of all persons accommodated at the Club Med facility in Haiti during the period when the plaintiffs stayed there." Plaintiffs' Interrogatory No. 8.

WHEREFORE, your affirmant respectfully requests that the Court grant its motion for a protective order and grant such other and further relief as to this Court seems just and proper.

Dated: New York, New York
November 22, 1982

CHRISTOPHER W. CHAN

No. 83-461

Office - Supreme Court, U.S.
FILED
OCT 24 1983
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1983

CLUB MEDITERRANEE, S.A., a Foreign Corporation,

Appellant,

vs.

MARJORIE SCHLOSSBERG DORIN and PHILIP DORIN,

Appellees.

On Appeal from the New York Supreme Court, Appellate Division, First Department

APPELLANT'S REPLY BRIEF

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APPENDIX

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No. 83-461

In The

Supreme Court of the United States

October Term, 1983

CLUB MEDITERRANEE, S.A., a Foreign Corporation,

Appellant,

vs.

MARJORIE SCHLOSSBERG DORIN and PHILIP DORIN,

Appellees.

On Appeal from the New York Supreme Court, Appellate Division, First Department

APPELLANT'S REPLY BRIEF

PRELIMINARY STATEMENT

Club Mediterranee, S.A., the Appellant herein, pursuant to Supreme Court Rule 16, respectfully submits this memorandum in opposition to Appellees' Motion to Dismiss Appeal.

INTRODUCTION

Appellees, in support of their Motion to Dismiss have raised five grounds of objection against Appellant's appeal to this Court. Before addressing those contentions, however, it is necessary first to correct a number of potentially misleading assertions contained in Appellees' "Statement of the Case".

Appellees allege that Club Med, Inc., A New York corporation, is the "alter-ego" of Club Mediterranee, S.A. In footnote "1" at page 2 of their brief, Appellees note that Appellant had asserted that it does not maintain any office in the United States and that the relationship between it and Club Med, Inc. is one of principal and agent. Appellees stated further in such footnote that "[T]hese assertions have not been proven and, in fact, the complaint contains allegations to the contrary". It should be noted, that there is, of course, no burden of proof upon Club Mediterranee, S.A. to prove its assertions, but rather the burden of proof remains with the Appellees to prove their allegation that Club Med, Inc. is the "alter-ego" of Club Mediterranee, S.A.

Pursuant to its "alter-ego" theory, Appellees, throughout their brief, refer to Club Med, Inc. and Club Mediterranee, S.A. jointly as "Club Med". Obviously, Appellees' purpose is to blur the distinctions between the actions of two separate and distinct entities and to buttress its implied, but unfounded, position that in seeking discovery against Club Mediterranee, S.A. it is doing no more than seeking discovery against a domestic corporation.

Similarly, in an obvious attempt to booster their presentation of what they refer to as "Club Med's vigorous utilization of the CPLR" Appellees make reference to Club Med "utilizing" the CPLR "on behalf of its co-defendant Societe Generale" (*see* first full paragraph on page 4 of Appellees' brief). Neither Club Med, Inc. nor Club Mediterranee S.A. has utilized anything in the CPLR on behalf of Societe Generale. The facts of the matter are that all three corporations are represented by the same law firm and that, clearly, any actions taken by Societe Generale against the Appellees is completely separate and irrelevant to the actions taken by Club Mediterranee S.A. The statements contained in that paragraph are inaccurate with respect to Club Mediterranee S.A.'s use of the CPLR in this litigation.

An allegation of questionable propriety on the part of the Appellees occurs in footnote (2) on page 3 of Appellees' brief. There it is alleged that Appellant is seeking "to evade its responsibilties and obligations of appearing in local courts and cooperating with local court rules with regard to discovery". Such statement is clearly unnecessary and abusive inasmuch as the Appellees admit on the same page that Club Mediterranee S.A., "did not challenge service or jurisdiction". (Appellees' Brief p.

3). Club Mediterranee S.A. has contrary to Appellees' allegations, in fact, appeared without protest in the local courts below and has constantly tendered its cooperation with regard to discovery, insisting only, however, that such discovery be conducted in accordance with the Hague Evidence Convention.

In summary, contrary to the assertions of Appellees, Club Mediterranee S.A. has from the inception of this litigation presented itself as a separate, French entity, related by agency to Club Med, Inc. and completely unrelated to Societe Generale. It has no standing with respect to any litigation between Appellees and Societe Generale. Similarly, it has sought to evade no responsibility, but has appeared voluntarily and cooperated fully, short of violating the Hague Evidence Convention and French internal and penal law.

ARGUMENT

I.

Appellees are free to conduct discovery in accordance with the CPLR with respect to any information not within the control of Club Mediterranee, S.A. in France.

The Appellant fails to understand what the Appellees are attempting to say in their first point of their brief. At no time during this litigation has the Appellant ever taken the position that information located outside the possession of Club Mediterranee S.A. in France was not discoverable. The Appellant had throughout this litigation alleged that Club Med, Inc. is a New York corporation and subject to the CPLR. If there is any information within the control of Club Med, Inc. located in New York then the Appellees are free to seek such relevant information in accordance with procedures of the CPLR. The Appellant has never disputed this and does not dispute this now.

The Appellant's sole objection is to any discovery being sought from it in France in a form not in accord with the Hague Evidence Convention. The interrogatories subject to this appeal were not served on any other defendant but were specifically served upon Club Mediterranee S.A. The simple fact of the matter is that the information (and descriptions of allegedly relevant documents) being sought from Club Mediterranee S.A. would

be so provided by Club Mediterranee S.A. in France. Interrogatory Number "1" asks Club Mediterranee to "State the name, address, position and title of the person answering these interrogatories". Who does counsel for the Appellees think is going to answer, under oath, such interrogatories? Clearly it would be an officer and/or director of Club Mediterranee S.A. in France.

Accordingly, Appellees' allegation that Appellant has failed to "factually demonstrate that Appellees' interrogatories require an investigation in French territory [or] involve obtaining evidence of French nationals on French soil" is absurd on its face. Club Mediterranee S.A. is located in France, a French national would be required to answer and verify the interrogatories so served upon Club Mediterranee S.A. and French nationals would be obviously involved in the search for, identification and production of any documents in an internal document production conducted by Club Mediterranee S.A. in response to such interrogatories.

Similarly, Appellees' allegation that the "trial court expressly found that Appellant had failed to meet this factual burden" is without merit. The trial court made no such express ruling. The order of the trial court (Jurisdictional Statement Appendix pp. 5a-6a) seems to interpret the letter of the French Ministry of Justice (Jurisdictional Statement Appendix pp. 93a-96a) as indicating that the Hague Evidence Convention only applies where the discovery proceeding itself would physically take place within French territory. This requirement would, of course, strip the Hague Evidence Convention of any effect since in virtually every situation opposing counsel would simply demand that the information, documents or individuals located in the foreign country be transported to the country of the situs of the discovery proceedings. Quite obviously, the intent of the Hague Evidence Convention was to enact certain procedures for the taking of pre-trial evidence where the discovery *material* is located in said foreign country, not the discovery proceeding.

II.

Appellant need not seek a waiver of penal sanctions for the illegal disclosure of evidentiary materials.

Appellees, recognizing the applicability of French penal law to the proposed illegal disclosure of evidentiary materials by a

French national, Club Mediterranee S.A., has put forth the astounding contention that even though Appellant is a defendant below and even though no formal or informal discovery request has ever been made by the Appellees to the judicial authorities of France, Appellant has the affirmative duty nonetheless of seeking a waiver of criminal sanctions that its country has imposed for participation in illegal disclosure of evidentiary materials. (Presumably such a transmittal to and review of the interrogatories by the appropriate judicial authorities in France, as well as their decision regarding a "waiver" would be required to be completed within the fifteen (15) days as specified in the interrogatories in question).

In support of this argument, Appellees rely upon four cases; *Societe Internationale v. Rogers,* 357 U.S. 197 (1957); *In re Westinghouse Electric Corp.,* 563 F. 2d 992 (10th Cir. 1977); *Arthur Andersen v. Finesilver,* 546 F. 2d 338 (10th Cir. 1976), *cert. denied,* 429 U.S. 1096 (1977); and *Ghana Supply Commission v. New England Power Company,* 83 F.R.D. 586 (D. Mass. 1979). These cases are totally inapplicable to and distinguishable from the issues at bar.

Firstly, three of the above four cases[1] involved situations where purportedly foreign entities were suing as plaintiffs, thus affirmatively exposing themselves to the judicial processes of particular American courts. The case of *Ghana Supply Commission, supra,* dealt directly with this fact when it stated,

> "we conclude that the [plaintiff] . . . by instituting this civil action . . . has waived any privilege it might have otherwise had to prevent disclosure of information . . . " 483 F.R.D. at 594.

Secondly, none of these cases dealt with an international treaty such as the one at bar in which the United States government, in association with other nations, approved and adopted a specific procedure for pre-trial discovery of evidentiary information in litigation involving multi-national parties. The Hague Evidence Convention, as previously noted, is not a discretionary statute

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1. *Arthur Andersen & Co. v. Finesilver, supra,* excepted.

and it is not a "foreign" law.[2] It is a federal law (28 U.S.C. Section 1781) mandating compliance by the plaintiffs herein.

Thirdly, the Supreme Court expressly recognized the validity of non-compliance in the face of penal sanctions in *Societe International v. Rogers, supra,* when it reversed the lower court's dismissal of petitioner's complaint, and stated

> "It is hardly debatable that fear of criminal prosecution constitutes a weighty excuse for non-production, and this excuse is not weakened because of laws preventing compliance are those of a foreign sovereign . . . . Here . . . the very fact of compliance by disclosure . . . will constitute the initial violation of Swiss laws." 357 U.S. at 211.

And finally, in the *Westinghouse* case, *supra,* even though the party seeking access to information located abroad was the defendant, it still attempted to comply with basic international discovery procedures by the service of letters rogatory upon the Canadian government. (Thus giving the judicial authorities in that country the appropriate opportunity to review the issues.) Here, there has been no effort by the Appellees to comply with the requirements of the aforesaid international and federal law.

III.

Appellees have selectively interpreted Article 27 of the Hague Evidence Convention.

The transcenient theme of Appellees' brief in support of their position to completely abrogate the terms and requirements of the Hague Evidence Convention is that the application of this international treaty and federal law by local courts here (and presumably abroad) is "discretionary." To justify this position, portions of Article 27 of the Hague Evidence Convention are cited. But coincidentally, and quite intentionally, subsection (a), which explains the intent of this provision, was not cited. It states:

> "The provisions of the present Convention shall not prevent a contracting state from

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2. In *Arthur Andersen & Co. v. Finesilver, supra*, the Court expressly ruled only that "[F]oreign law may not control local law", 546 F.2d at 342. A question of *federal* law v. local law was not presented to the Court.

(a) declaring that Letters of Request may be transmitted to its judicial authorities through channels other than those provided for in Article 2;"

The obvious purpose of this provision is to permit signatory nations in which discovery materials or information is being sought (*i.e.*, France, herein) the opportunity to allow alternative methods for the taking of such evidence, if they so choose. It does not, and certainly cannot logically mean — as Appellees attempt to show — that a local court, in which a request for discovery originates (*i.e.*, the United States herein) can dictate the required "alternative" procedure that the judicial authorities in France must follow. To interpret this provision in such a way would quite clearly destroy the very essence of this treaty which was adopted and exacted as law by our government in recognition of the legitimate interests that foreign nations have in their judicial processes.

The Court's attention is directed to the fact that Appellees' interpretation is a sword that cuts both ways. By summarily annulling the essential provisions of this treaty, American domiciliaries which may do or transact some business abroad (or are otherwise subject to the jurisdiction of a foreign court) will become subject as well to the whims, vagaries and uncertainties of local discovery rules throughout the world — the very situation this treaty was intended to prevent.

The application of Article 27 to the facts and circumstances herein would permit the Republic of France to exercise discretion, if it so chooses, in its method of supplying requested evidentiary materials and information. It is obvious, however, that the judicial authorities therein cannot be expected to exercise any discretion where they have received no request, nor where there has been even the slightest pretense made by the Appellees to appropriately request the evidentiary material being sought.

Appellees' reliance on Article 27 is misplaced and totally without merit.[3]

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3. Appellees' reference to *Volkswagenwerk v. Superior Court*, 123 Cal. App.3d, 840, 176 Cal.Rptr. 874 (1981) is hardly authority for the proposition that the Hague Evidence Convention is "discretionary." First, the opinion is

(Cont'd)

IV.

Implementation of the CPLR does not waive one's rights under federal law.

Appellees advance the position that by virtue of the lower court's *in personam* jurisdiction over Club Mediterranee S.A., Appellant's rights under other, unrelated, but equally applicable federal law have been waived or are now subject to an estoppel. This position is, both erroneous and untenable.

The Hague Evidence Convention is separate and apart from any statutes or laws governing jurisdiction. It, in fact, presumes that personal jurisdiction has already been established over a defendant. That Club Mediterranee S.A. is a French corporation is uncontested by the Appellees. Accordingly, in seeking discovery against such French entity, the provisions of the aforesaid treaty are applicable and binding upon the Appellees. The case at bar is, in fact, the very type of case envisioned by the drafters of The Hague Convention.

As a corporation being sued in the courts of New York, Club Mediterranee S.A., had every right, duty and obligation to enter

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(Cont'd)

not, as Appellees state, a California Supreme Court opinion, but rather is an opinion of the California Court of Appeals, First District. Second, the cited paragraph is mere *dicta*. Third, and most importantly, as demonstrated above, the substance of the cited paragraph is simply wrong. The Court's reference to Article 27 is nothing more than an inartful attempt to avoid deciding a constitutional issue. Finally, the opinion itself is authority for the proposition that Appellees' refusal to even attempt to comply with the Hague Evidence Convention is also wrong: "If the initial discovery order is to be validated, and if consideration of conflicts of sovereignty is to be postponed until after the responding party has failed to give the order of discovery, then at least the initial discovery order must appear to take into account the ascertainable requirements of the foreign state and to adopt those procedures which are least likely to offend that state's sovereignty . . . [B]ut if a channel more apt to elicit cooperation of a foreign government is plainly available but is not used, then in our view the insufficient account of the requirements of international comity had been taken and the order should be set aside in the first instance. [H]ere, the Hague Convention provides an obvious and preferable alternative means of obtaining evidence from within West Germany." 123 Cal.App.3d at 858. Indeed, the Court concluded that "the Trial Court in the exercise of judicial restraint based on international comity should have declined to proceed other than under the Hague Convention . . ." *Id.* at 859.

an appearance and demand the particulars of the claims levied against it. The Appellees are residents of New York State who have chosen the forum and, thus, are subject to all of the provisions of the New York civil practice statutes with respect to pre-trial discovery proceedings. The Appellant is not a New York State resident. It is a foreign, international corporation which has not affirmatively sought the jurisdiction of the courts of New York and has in no way waived any of its rights by merely defending an action brought against them here. If a foreign party, subject to the terms of the Hague Evidence Convention, waives those rights by simply entering an appropriate defense, then the treaty would be meaningless and illusory. Such a "Catch-22" situation cannot be the intent of this law and should, respectfully, not be created or sanctioned by an affirmance of the New York courts below.

The central theme underlying the contentions of Appellees' counsel in the litigation of this issue is that it is "unfair" that the parties herein are subject to different rules regulating pre-trial discovery. It may be considered equally unfair that the Appellant, a French corporation, may be sued in the courts of New York for an incident which allegedly occurred in a *foreign country*. Nevertheless, the same principle of law which has created the availability of jurisdiction in New York State over such Appellant, has also resulted in the establishment of an accepted procedure for the litigation of the case. Contrary to Appellees' assertions, it is the Appellees who are seeking the best of both worlds: jurisdiction over a foreign defendant without the statutory mandates attendant therewith.

V.

Appellees' position that this Court has no jurisdiction over this appeal is without merit.

Clearly, a state court rule may be deemed a state "statute" for Section 1257(2) purposes. *In re Griffiths,* 413 U.S. 717 (1973). In addition, the "validity" of a state statute is also said to have been sustained, within the meaning of Section 1257(2), when the state court holds the statute applicable to a particular set of facts as against the contention that such an application is invalid on federal grounds. *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282 (1921); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58,

61, n.3 (1963); *Cohen v. California,* 403 U.S. 15, 17-18 (1971). Clearly, such is the case with this appeal.

Appellees' contention that the Appellant did not "make specific and plain . . . [its] contention that the application of the [CPLR] to [its] particular circumstances would make the [CPLR] void under Federal law" is absurd on its face. In the affirmation of Christopher W. Chan, Esq., submitted as part of Appellant's original motion to strike Appellees' interrogatories, Mr. Chan stated as the "BASIS FOR MOTION" as follows:

> "As the annexed Memorandum of Law indicates, the aforesaid interrogatories are barred pursuant to International Law and Treaty, French, Criminal and Civil Law, as well as Laws in the United States and New York Civil Practice Law and Rules."

(*See* page 4a of Appellees' brief.)

In the memorandum of law accompanying Mr. Chan's affirmation (which was *not* included in the appendix to Appellees' brief), the first point presented was that the discovery proceedings were governed by the provisions of the Hague Evidence Convention on the basis that it was the "supreme law of the land", pursuant to Article 6, Clause 2 of the United States Constitution.[4] (*See* pages 1a-2a *infra.*) As Appellees concede, Appellant further raised such issue in one of the "questions" which Appellees sought to have certified by the Appellate Division of the Supreme Court of the State of New York. (*See* Jurisdictional Statement Appendix at 102a-124a.)

Finally, it should have been noted that in the context of Section 1257(2), an appeal will lie even if the state court is not explicit in overruling a timely challenge, on federal grounds, to the validity of a state statute, so long as the challenge itself is explicit. *See Largent v. Texas,* 318 U.S. 418 (1943). As long as the statute is sustained, the Court has necessarily rejected such an objection. Its silence in this respect is immaterial and cannot

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4. Similarly, the Appellant's first point in its brief to the Appellate Division of the Supreme Court of the State of New York on its initial appeal raised the same issue and cited the same law. (*See* pages 15a-16a, *infru.*)

destroy the right to appeal under Section 1257(2). *See* Stern & Gressman, *Supreme Court Practice,* Fifth Edition, Section 3.4 at p. 163.

CONCLUSION

WHEREFORE, the Appellant respectfully submits that Appellees' motion to dismiss this appeal should be, in all respects, denied.

Respectfully submitted,

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Counsel of Record
KROLL, POMERANTZ
& CAMERON
Attorneys for Appellant

SOL KROLL
RAYMOND L. MYLOTT, JR.
Of Counsel

APPENDIX

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT CLUB MEDITERRANEE S.A.'S MOTION FOR A PROTECTIVE ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MARJORIE SCHLOSSBERG DORIN and PHILIP A. DORIN

Plaintiffs,

-against-

CLUB MEDITERRANEE, S.A., CLUB MED, INC., CELEBRITY TRAVEL SERVICE, LTD., KENT TRAVEL SERVICE, INC., SOCIETE GENERALE and NATIONAL UNION FIRE INSURANCE,

Defendants.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT, DEFENDANT, CLUB MEDITERRANEE, S.A.'s MOTION FOR A PROTECTIVE ORDER

The facts have been adequately set forth in the moving papers. Suffice it to say, defendant, CLUB MEDITERRANEE, S.A., moves for a protective order pursuant to CPLR §3133, striking plaintiffs' interrogatories.

POINT I

Discovery Proceedings as Issues Herein Are Governed by the Provisions of The Hague Convention.

Memorandum of Law

The United States and France are parties to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* March 18, 1970, 23 U.S.T. 2555, T.I.A.S. No. 7444 (entered into force for the United States October 7, 1972; entered into force for France April 9, 1975) (the "Hague Convention"),[1] a copy of which is annexed hereto as Exhibit "A".

This international treaty, as its name implies, was adopted specifically for the purpose of regulating and administering the process of taking evidence in civil cases such as the one at bar. The provisions of this treaty, of course, supercede and take precedence over any possibly conflicting state law. See *Rosman v. Trans-World Airlines Inc.*, 34 N.Y. 2d 393, 358 N.Y.S. 2d 97 wherein the Court of Appeals stated, "It [a similar treaty adopted and approved by the United States Government] is the supreme law of the land (U.S. Const., Art. VI, cl. 2) of which New York courts are required to take judicial notice (CPLR 4511, subd. [a] Consol. Laws, c. 8) 358 N.Y.S. 2d as 103. See also, *Low v.. Bayerische Motoren Werke, A.G.*, 449 N.Y.S. 2d 733 (A.D. 1st Dep't., 1982).

POINT II

Plaintiffs' Interrogatories Are a Nullity as a Result of both Defective Form and Improper Service.

The Hague Convention contemplates that when evidence in a judicial proceeding is sought to be obtained by a party in one

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1. The Hague Convention and the Reservations thereto made by the contracting states may be found in 6 Martindale-Hubbell 4628-39 (1982). The Convention text, without the Reservations, may also be found in the notes to 28 U.S.C.A. §1781 (West Supp. 1981).

signatory country from a party in another signatory country, a judicial authority of the country from which the inquiry initiates (the Department of Justice in the United States) shall prepare a letter of request (in the United States called a letter rogatory) which "shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of the State." Convention Art. 2.

Pursuant to the specific requirements of the French government, expressly noted in the convention, letters rogatory seeking pre-trial disclosure of evidence must be sent to the French Ministry of Justice, Civil Division of International Judicial Assistance, which has been designated as the Central Authority, to the exclusion of all others. Moreover, letters of request must specify certain items mentioned in Article 3 of the Convention and must be in French or be accompanied by a certified translation in French. Art. 4 and Reservation thereto. There is no question that this is the method which must be followed under the terms of the Convention. A recommended model for such letters of request is attached to the end of the Convention text.

POINT III

Request for Documents Cannot Be Used Against French Corporations By United States Plaintiff

Letters of request are the sole means of judicial discovery directed by a United States plaintiff against a French defendant. France, by its Reservation to the Convention, accepted by the United States, has made it clear that "it will not execute Letters of Request for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries." Reservation to Art. 23 of the Convention.

Memorandum of Law

By directing document requests to CLUB MEDITERRANEE, S.A., the plaintiffs have attempted to ride roughshod over the Convention. Plaintiffs' efforts to require CLUB MEDITERRANEE, S.A. to answer the Interrogatories must be denied on this second ground with respect to discovery of documents.

POINT IV

CLUB MEDITERRANEE, S.A. Would Violate French Criminal Law By Answering Interrogatories

French law[2] makes it a crime for CLUB MEDITERRANEE, S.A. to answer the Interrogatories:

> Art. 1 bis. Subject to treaties or international agreements and to the laws and regulations in force, every person is forbidden . . . to communicate, in writing, orally or in any other manner, documents or information of an economic, commercial, industrial, financial or technical nature intended to serve as evidence in foreign judicial . . . proceedings. . . .

Law No. 80-538 of July 16, 1980 (the "Act"), as translated in Parker School Studies in Foreign and Comparative Law, Columbia University, *French Law: Constitution and Selective Legislation* 8-49 to 50 (1981), annexed hereto as Exhibit "B", original version at II.9. Appendice au Code de Commerce, Petits Codes Dalloz (soixante-seizieme ed. 1980-81), annexed hereto as Exhibit "C". Perusal of the questions and requests for documents in the

2. The issue of foreign law is raised here in accordance with CPLR §4511(b).

Interrogatories demonstrates that virtually all the information sought with respect to the ownership, construction and operation of his business enterprise is of an "economic, commercial, industrial, financial or technical nature" within the meaning to the Act.

Violation of the act by an officer or agent of CLUB MEDITERRANEE, S.A. could result in imprisonment of up to six months and a fine of 120,000 francs. Under long-standing principles of international law, CLUB MEDITERRANEE, S.A. should not be ordered by an American court to violate French Law, particularly where it is the penal law of France that is at issue. *Federal Trade Commission v. Compagnie de Saint-Gobain-Pont-A-Mousson,* 636 F.2d 1300, 1327 n. 150 (D.D.C. 1980) ("Principles of international comity require that domestic courts not take action that may cause the violation of another nation's law."); *Volkswagenwerk A.G. v. Superior Court,* 123 Cal. App. 3d 840, 176 Cal. Rptr. 874 (1981) (following discovery methods of Convention for discovery against West German corporation); *Frummer v. Hilton Hotels International, Inc.,* 60 Misc.2d 840, 304 N.Y.S. 2d 335 (S.CT. Kings Co., 1969) (English law of negligence held applicable in personal injury suit).

The possible imposition of criminal liability against CLUB MEDITERRANEE, S.A. for its production of documents and other information sought by the plaintiffs provides a further basis upon which to deny plaintiffs' demands and inquiries as set forth in the Interrogatories in question.

POINT V

The Hague Convention Bars Discovery That Is Illegal Under French Law

Memorandum of Law

The Hague Convention states that if a country's laws prohibit a person of that country from divulging certain information, then the person cannot be required to produce that information:

> The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed. . . . In the execution of a Letter of Request the person concerned may refuse to give evidence insofar as he has a privilege or duty to refuse to give the evidence . . . under the laws of the state of execution. . . .

Arts. 9 and 11.

Since the international treaty in question expressly recognizes the rights of foreign corporations under the laws of their national domicile, this court is respectfully barred from ordering compliance to plaintiffs' demands.

POINT VI

Plaintiffs' Interrogatories Exceed the Permissable Area of Inquiry Under New York State Law

CPLR §3101 requires disclosure of evidence which is "material and necessary" in the prosecution or defense of an action. Even if the inquiries posed to CLUB MEDITERRANEE, S.A. were not blatantly defective both substantively and procedurally under international and federal law binding upon this Court, they would still be beyond the scope of permissable discovery under New York State law.

Memorandum of Law

Plaintiffs are alleging that Marjorie Dorin sustained a type of gastrointentinal illness during a one week vacation at defendant's facility in Haiti.

A review of their Interrogatories reveals that they seek information that is far beyond the scope of relevant inquiry.

It is clear, therefore, that review of the Interrogatories propounded to defendant CLUB MEDITERRANEE, S.A. reveal that they violate not only national and international law, but New York State law as well.

POINT VII

Summary Of Law

The Hague Convention is an international treaty that has been adopted, approved and signed by the governments of both France and the United States. As such, it has become the law of our nation (28 U.S.C. §1781) and binding upon the states. The effect of this Convention as well as the French Code of Civil Procedure upon discovery by a United States plaintiff directed toward a French defendant has been carefully analyzed in a letter from the French Ministry of Justice to the United States Department of Justice, Office of Foreign Litigation, dated March 9, 1981 (Department of State translation), annexed hereto as Exhibit "D", which provides:

> [T]he only two methods of investigation in French territory that may be ordered by foreign legal authorities, subject to the conditions established by these instruments, are letters of request [i.e., letters rogatory] and taking of evidence by diplomatic officers, consular agents, and

commissioners (Chapters I and II of The Hague Convention of March 18, 1970, and Articles 733 *et sec.* of the new French Code of Civil Procedure). Notwithstanding the agreement between the parties, Article 1 bis of the law of July 16, 1980 prevents recourse in French territory to any other methods of investigation or procedure for taking of evidence that in considered unlawful, *particularly recourse to requests for direct disclosure of documents or information.*

Moreover, Article 1 bis makes it possible to punish violations of the conditions established in The Hague Convention and in the declaration which the French government made at the time of ratification of this instrument for the execution of letters of request and the taking of evidence by commissioners.

Therefore, the Law of July 16, 1980, has given full effect to our relations of judicial cooperation by assuring improved implementation of the provisions of The Hague Convention of March 18, 1970 and by enabling American litigants to obtain evidence in France, by methods that are in conformity with the international commitments of our two countries, for use in judicial proceedings in the United States.

(Emphasis added.)

The letter from the French Ministry of Justice aptly summarizes two salient points. First, there are avenues available for discovery, if plaintiffs are willing to abide by them. Second,

France is adamant that the prescribed procedures be followed and will impose criminal penalties upon French nationals who might otherwise be inclined to ignore the established procedures. Plaintiffs herein appear intent on ignoring the clear directives of the Hague Convention.

It would, most respectfully, be unjust for this Court to ignore the requirements imposed by international and federal law and order compliance by defendant CLUB MEDITERRANEE, S.A., with the illegal discovery propounded by the plaintiffs.

CONCLUSION

It is respectfully requested, therefore, that plaintiffs' Interrogatories to defendant CLUB MEDITERRANEE, S.A. be stricken and that plaintiffs hereafter be compelled to comply with the relevant provisions of the Hague Convention in proceeding with the pre-trial disclosure herein.

Respectfully submitted,

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Robert Stein, Esq.
On the Brief

Memorandum of Law

EXHIBITS ANNEXED TO FOREGOING MEMORANDUM ARE OMITTED

BRIEF FOR DEFENDANT-APPELLANT CLUB MEDITERRANEE, S.A.

To be argued by
ROBERT STEIN

NEW YORK SUPREME COURT

Appellate Division - First Department

MARJORIE SCHLOSSBERG DORIN and PHILIP A. DORIN

Plaintiffs-Respondents,

-against-

CLUB MEDITERRANEE, S.A.,

Defendant-Appellant,

-and-

CLUB MED, INC., CELEBRITY TRAVEL SERVICE, LTD., KENT TRAVEL SERVICE, INC., SOCIETE GENERALE and NATIONAL UNION FIRE INSURANCE,

Defendants.

BRIEF FOR DEFENDANT APPELLANT

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Brief

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Brief

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION - FIRST DEPARTMENT

Index No. 4777/82

MARJORIE SCHLOSSBERG DORIN and PHILIP A. DORIN

Plaintiffs-Respondents,

-against-

CLUB MEDITERRANEE, S.A.,

Defendants-Appellants.

-and-

CLUB MED, INC., SOCIETE GENERALE, CELEBRITY TRAVEL SERVICE, LTD. and KENT TRAVEL SERVICE, INC. and NATIONAL UNION FIRE INSURANCE,

Defendants.

BRIEF OF DEFENDANT-APPELLANT CLUB MEDITERRANEE, S.A.

PRELIMINARY STATEMENT

This is an appeal from an order of the Hon. Justice Stanley Parness dated January 5, 1983, denying in part the motion of the defendant CLUB MEDITERRANEE, S.A., which sought a protective order with respect to interrogatories propounded by plaintiffs on said defendant.

Brief

FACTS

Plaintiffs have brought this action against defendant/appellant CLUB MEDITERRANEE, S.A., among others, for personal injuries allegedly sustained by MARJORIE SCHLOSSBERG DORIN while she was a guest at a Club Med resort in the Republic of Haiti during the period between December 26, 1982 and January 2, 1982. CLUB MEDITERRANEE, S.A. has denied all of the material allegations of the complaint and has raised various affirmative defenses and cross-claims in its answer. Copies of the pleadings are annexed in the record. (pp. 6-29).

CLUB MEDITERRANEE, S.A. is a French corporation, duly existing pursuant and subject to the laws of France, including, but not limited to, those international treaties and conventions to which France is a signatory. Said defendant is not incorporated anywhere within the United States nor does it maintain any offices in this country for the purpose of its ownership, operation and/or control of the resort in question.

In personam jurisdiction has not been contested by the aforesaid defendant in this legal action.

In or about September of 1982, plaintiffs' counsel served the set of interrogatories in question directly upon the undersigned firm as counsel for CLUB MEDITERRANEE, S.A. in clear contravention to the terms and requirements of the Hague Evidence Convention, *infra.* (pp. 78-89). The within motion for a protective order was made by the appellant in Special Term, Part I of the Supreme Court, New York County and it is the decision and order of the Hon. Stanley Parness pursuant to that motion which is the subject of the instant appeal.

Brief

QUESTION PRESENTED

Are the interrogatories propounded by plaintiffs in contravention of and prohibited by the terms of the Hague Evidence Convention?

ARGUMENT

POINT I

Discovery Proceedings Herein Against CLUB MEDITERRANEE, S.A. Are Regulated by the Provisions of the Hague Evidence Convention.

The United States and France are parties to the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, opened for signature March 18, 1970, U.S.T. 2555, T.I.A.S. No. 7444 (entered into force for the United States on October 7, 1972; entered into force for France on April 9, 1975) (the "Hague Evidence Convention"),[1] a copy of which is annexed in the Record. (pp. 78-89).

This international treaty, as its name implies, was adopted specifically for the purpose of regulating and administering the process of taking evidence in civil cases such as the one at bar. Prior thereto the clash between pre-trial discovery procedures in common law nations such as the United States and Civil Law nations such as the Republic of France often led to intractable

1. The Hague Convention and the Reservations thereto made by the contracting states may be found in 6 Martindale-Hubbell 4628-39 (1982). The Convention text, without the Reservations, may also be found in the notes to 28 U.S.C.A. Section 1781 (West Supp. 1981).

situations in civil litigation involving parties of both nations. American draftsmen played a leading role among the twenty-five nations which participated in the drafting of the Convention, and it presently is in force between the United States and nine other countries with which American litigants often are involved, including Britain, France, the Scandinavian nations, Czechoslovakia and Portugal.[2]

The provisions of this treaty, of course, supercede and take precedence over any possibly conflicting state law. See *Rosman v. Trans-World Airlines, Inc.*, 34 N.Y.2d 393, 358 N.Y.S.2d 97 wherein the Court of Appeals stated, "It [a similar treaty adopted and approved by the United States Government] is the supreme law of the land (U.S. Const., Art. VI, cl. 2) of which New York courts are required to take judicial notice (CPLR 4511, subd. [a] Consol. Laws, c. 8) 358 N.Y.S.2d at 103. See also, *Low v. Bayerische Motoren Werke, A.G.*, 449 N.Y.S.2d 733 (A.D. 1st Dep't. 1982).

POINT II

Plaintiffs' Interrogatories are a Nullity Pursuant to the Provisions of the Hague Evidence Convention

The Hague Evidence Convention requires that when evidence in a judicial proceeding is sought to be obtained by a party in one signatory country from a party in another signatory country, a judicial authority of the country from which the inquiry initiates (the Department of Justice in the United States) shall prepare

2. See, International Lawyer, Vol. 13, "Existing Rules and Procedures," by James H. Carter, p. 10.

a letter of request (in the United States called a letter rogatory) which "shall be sent to the Central Authority of the State of execution without being transmitted through any other authority of the State." Convention Art. 2.

Pursuant to the specific requirements of the French government, expressly noted in the convention, such letters of request seeking pre-trial disclosure of evidence must be sent to the French Ministry of Justice, Civil Division of International Judicial Assistance, which has been designated as the Central Authority, to the exclusion of all others. Moreover, letters of request must specify certain items mentioned in Article 3 of the Convention and must be in French or be accompanied by a certified translation in French. Art. 4 and Reservation thereto. There is no question that letters of request are the sole means of judicial discovery which must be followed under the terms of the Convention. A recommended model for such letters of request is attached to the end of the Convention text.

By directing document requests and interrogatories to counsel for CLUB MEDITERRANEE, S.A. in their present form, plaintiffs have completely ignored the clear provisions of binding international and national law.

One of the few cases discussing the interpreting the Hague Evidence Convention with respect to conflicting American procedural law was that of *Volkswagenwerk A.G. v. Superior Court*, 123 Cal. App.3d 840, 176 Cal. Rptr. 874 (1981). This case involved a personal injury action arising out of a motor vehicle collision. One of the vehicles was manufactured by the appellant therein. Plaintiff's claim was that the vehicle in question was defectively designed. The California appellate court, while recognizing their appropriate jurisdiction over the appellant nevertheless reversed the pre-trial discovery order of the lower

court and strictly enforced the requirements under the Hague Evidence Convention. The court stated,

> ". . .in cases such as this American courts traditionally and properly recognize the countervailing force of international comity: The concept that the courts of one sovereign state should not, as a matter of sound international relations, require acts of forebearances within the territory, and inconsistent with the internal laws, of another sovereign state unless a careful weighing of competing interests and alternative means makes clear that the order is justified. Rulings based on this concept of internationa! comity are dictated not by technical principles of jurisdiction of the parties to or subject-matter of particular lawsuits, but rather by exercise of judicial self-restraint in furtherance of policy considerations which transcend individual lawsuits. (Cf. Rest.2d Foreign Foreign Relations Law of the United States, Sections 39-40.) Particularized to discovery matters it is (as VWAG 1973 recognized) 'a policy of avoiding international discovery methods productive of friction with the procedures of host nations.' (VWAG 1973, supra, 33 Cal.App.2d at p.508, 109 Cal.Rptr. 219.) 123 Cal.App.3d at 858, 176 Cal.Rptr. at 884.

The court goes on to state:

> "[A]t least the initial discovery order must appear to take into account the ascertainable requirements of the foreign state and to adopt those procedures which are least likely to offend

> that state's sovereignty. . . .[I]f a channel more apt to elicit the cooperation of the foreign government is plainly available but is not used, then in our view the insufficient comity had been taken and the [discovery] order should be set aside in the first instance.
>
> Here the Hague Convention provides an obvious and preferable alternative means of obtaining evidence . . . ." 176 Cal.Rptr. at 885.

Plaintiffs' counsel contends that the policy of international comity applied by the court in the above *Volkswagenwerk* case in their enforcement of the Hague Evidence Convention should not be followed in the case at bar. Quite to the contrary, the guidelines of this international treaty must be observed not merely because it is an American judicial policy not to contravene the laws of a foreign country in a legal action involving one of their nationals, but rather because this treaty has been specifically enacted as law by the government of the United States (28 U.S.C. §1781), and as such is absolutely binding upon the courts of this State.

The required procedure was not even remotely observed or recognized by the plaintiffs herein and as such the interrogatories served upon counsel for CLUB MEDITERRANEE, S.A. are a nullity under the laws of our Nation and State.

Brief

POINT III

CLUB MEDITERRANEE, S.A. Would Violate French Criminal Law By Answering Interrogatories

French law[3] makes it a crime for CLUB MEDITERRANEE, S.A. to answer the interrogatories:

> Art. 1 bis. Subject to treaties or international agreements and to the laws and regulations in force, every person is forbidden . . . to communicate, in writing, orally or in any other manner, documents or information of an economic, commercial, industrial, financial or technical nature intended to serve as evidence in foreign judicial . . . proceedings . . . .

Law No. 80-538 of July 16, 1980 (the "Act"), as translated in Parker School Studies in Foreign and Comparative Law, Columbia University, *French Law: Constitution and Selective Legislation*, 8-49 to 50 (1981), annexed hereto as Exhibit "B", original version at II.9. Appendice au Code de Commerce, Petits Codes Dalloz (soixante-seizieme ed. 1980-81), annexed in the record (pp. 90-92). Perusal of the questions and requests for documents in the Interrogatories demonstrates that virtually all the information sought with respect to the ownership, construction and operation of his business enterprise is of an "economic, commercial, industrial, financial or technical nature" within the meaning to the Act.

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3. The issue of foreign law is raised herein in accordance with CPLR Section 4511(b).

Brief

Violation of the act by an officer or agent of CLUB MEDITERRANEE, S.A. could result in imprisonment of up to six months and a fine of 120,000 francs. Under long-standing principles of international law, CLUB MEDITERRANEE, S.A. should not be ordered by an American court to violate French law, particularly where it is the penal law of France that is at issue.

The effect of the Convention, the French criminal law, and the French Code of Civil Procedure upon discovery by a United States party directed toward a French party has been carefully analyzed in a letter from the French Ministry of Justice to the United States Department of Justice, Office of Foreign Litigation, dated March 9, 1981 (Department of State translation), (see Record, pp. 93-99), which provides:

> [T]he only two methods of investigation in French territory that may be ordered by foreign legal authorities, subject to the conditions established by these instruments, are letters of request [i.e., letters rogatory] and taking of evidence by diplomatic officers, consular agents, and commissioners (Chapters I and II of The Hague Convention of March 18, 1970, and Articles 733 *et seq.* of the new French Code of Civil Procedure.)
>
> Notwithstanding the agreement between the parties, Article I bis of the Law of July 16, 1980 prevents recourse in French territory to any other methods of investigation or procedure for taking of evidence that is considered unlawful, *particularly recourse to requests for direct disclosure of documents or information.*
>
> Moreover, Article I bis makes it possible to punish violations of the conditions established in The

> Hague Convention and in the declaration which the French government made at the time of ratification of this instrument for the execution of letters of request and the taking of evidence by commissioners.
>
> Therefore the Law of July 16, 1980, has given full effect to our relations of judicial cooperation by assuring improved implementation of the provisions of The Hague Convention of March 18, 1970 and by enabling American litigants to obtain evidence in France, by methods that are in conformity with the international commitments of our two countries, for use in judicial proceedings in the United States.
>
> (Emphasis added.)

The letter from the French Ministry of Justice nicely summarizes two salient points. First, there are avenues available for discovery, if defendants are willing to abide by them. Second, France is adamant that the prescribed procedures be followed and will impose criminal penalties upon French nationals who might otherwise be inclined to ignore the established procedures.

The legislative history of the Act suggests that it was a response to the frequent disregard by American litigants of the terms of the Convention and the reservations made by France in ratifying the Convention. *See* Herzog, *The 1980 French Law on Documents and Information*, 75 Am. J.I.L. 382 (1981).

France, like most civil law countries, subscribes to the notion that civil or commercial litigation proceedings, including discovery, should be under the control of a judicial officer and not be left

to the parties without supervision. *See, id.* at 385. The above Act puts teeth into France's approach towards compliance with a binding international agreement.

The possible imposition of criminal sanctions against CLUB MEDITERRANEE, S.A. for its production of documents and other information sought by the plaintiffs provides a further basis upon which to deny plaintiffs' demands and inquiries as set forth in the Interrogatories in question.

POINT IV

The Hague Evidence Convention Bars Discovery That is Illegal Under French Law

The Hague Evidence Convention states that if a country's laws prohibit a person of that country from divulging certain information, then the present cannot be required to produce that information:

> The judicial authority which executes a Letter of Request shall apply its own law as to the methods and procedures to be followed . . . . In the execution of a Letter of Request the person concerned may refuse to give evidence insofar as he has a privilege or duty to refuse to give the evidence . . . under the laws of the state of execution . . . .

Arts. 9 and 11.

Since the international treaty in question expressly recognizes the rights of foreign corporations under the laws of their national domicile, the appellant therefore should not be required to respond to a clearly illegal form of pre-trial discovery.

Brief

POINT V

The Court Below, Respectfully, Erred In Its Interpretation and Application Of the Treaty (and Federal Law) in Question

In holding that the interrogatories in question were not barred by the Hague Evidence Convention the Court below made specific reference to its uncontested in personam jurisdiction over the defendant/appellant. It apparently derived some significance from this fact in terms of the parties' respective rights under applicable law governing pre-trial proceedings. Plaintiffs' counsel in his opposition to the motion below advanced the position, apparently adopted by Justice Parness, that by virtue of this Court's personal jurisdiction over defendant CLUB MEDITERRANEE, S.A., its rights under other, unrelated, but equally applicable law have either been waived or have evaporated of their own accord. This position is, most respectfully, erroneous and untenable.

The Hague Evidence Convention, described herein, is separate and apart from any statues or laws governing jurisdiction. It would, in fact, only become applicable once personal jurisdiction has already been established over a defendant. That CLUB MEDITERRANEE, S.A. is a French corporation is uncontested by the plaintiffs (See ¶2 of plaintiffs' complaint in Record, p. 6). As such, the provisions of the aforesaid treaty are applicable and binding upon this Court.

This is in fact the very type of case envisioned by the drafters of the Convention and the nations, including the United States, which have enacted same into law.

Brief

As a company being sued in the courts of New York, CLUB MEDITERRANEE, S.A. had every right, duty and obligation to enter an appearance and demand the particulars of the claims levied against it. The plaintiffs are residents of New York State who have chosen to utilize its legal process and as such they are subject to all of the provisions of the CPLR with respect to pre-trial discovery proceedings. The defendant is not a New York State resident. It is a foreign, international corporation which has not affirmatively sought the jurisdiction of the courts of New York and has in no way waived any of its rights by merely defending an action brought against them here. If a foreign party, subject to the terms of the Hague Evidence Convention, waives those rights by simply entering an appropriate defense, then the treaty would be meaningless and illusory. Such a catch-22 situation cannot be the intent of this law and should, respectfully, not be created or sanctioned by an affirmance of the order of Justice Parness.

The central theme underlying the contentions of plaintiffs' counsel in the litigation of this issue is that it is "unfair" that the parties herein are subject to different rules regulating pre-trial discovery. It may be considered equally unfair that the appellant, a French corporation, may be sued in the courts of this state for an incident which allegedly occurred in a *foreign country*. Nevertheless, the same principle of law which has created the availability of jurisdiction in New York State over such defendant, has also resulted in the establishment of an accepted procedure for the litigation of the case. Contrary to Mr. Dickerson's assertions below, it is the plaintiffs who are seeking the best of both worlds; jurisdiction over a foreign defendant without the statutory mandates attendant therewith.

The order of Justice Parness also cites from the aforementioned letter of the French Ministry of Justice, supra., pp. 12-13. The

order seems to interpret this letter as indicating that the Convention only applies where the discovery proceeding itself would physically take place within French territory. This requirement would of course strip the Convention of any effect since in virtually every situation opposing counsel would simply demand that the information, documents or individuals located in the defendants home country be transported to New York for discovery proceedings. Quite obviously, the intent of the Convention is to enact certain procedures for the taking of pre-trial evidence where the discovery *material* is located in said foreign country, not the discovery proceeding.

POINT VI

Summary of Law

The Hague Evidence Convention is an international treaty that has been adopted, approved and signed by the governments of both France and the United States. As such, it has become the law of our nation (28 U.S.C. §1781) and binding upon the states. This treaty established a uniform system for the taking of evidence in pre-trial discovery among signatory nations with entirely different forms of procedural law. It would, respectfully, be inequitable and unwise for this Court to ignore its significant international ramifications and reduce it to a meaningless document to be ignored at the whim of any local court in any nation at any time.

It is respectfully submitted that unless the Hague Evidence Convention is to be entirely ignored, there is no basis for an affirmance of the order of the court below.

Brief

CONCLUSION

The order of the trial court, dated January 5, 1983, should, most respectfully, be reversed.

Respectfully submitted,

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Brief

STATEMENT PURSUANT TO CPLR 5531

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : FIRST DEPARTMENT

MARJORIE SCHLOSSBERG DORIN and PHILIP DORIN,
Plaintiffs-Respondents,

-against-

CLUB MEDITERRANEE, S.A.,
Defendant-Appellant,

-and-

CLUB MED, INC., CELEBRITY TRAVEL SERVICE, LTD., KENT TRAVEL SERVICE, INC., SOCIETE GENERALE and NATIONAL UNION FIRE INSURANCE,

Defendants.

1. The Index Number of the case in the Court below is 4777/82.

2. The full names of the original parties are as set forth above.

3. The action was commenced in the Supreme Court, New York County.

4. The action was commenced by service of a summons and complaint on or about February 24, 1982. Issue was joined on March 26, 1982.

Brief

5. The nature and object of the action is a breach of contract action for the alleged failure to provide typhoid free accomodations.

6. The appeal is from an order made by Parness, J. and entered on or about January 17, 1983.

7. The appendix method of appeal is not being used. Appellant is proceeding upon filing a fully reproduced Record on Appeal.